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In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 3, 1986

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QUESTION PRESENTED

May a federal court abstain from adjudicating a statutorily based federal preemption claim that presents a substantial federal question where there is no countervailing state interest and which claim is not the subject of a state judicial proceeding?

STATEMENT REQUIRED BY RULE 28.1

The parent company of petitioner, New Orleans Public Service Inc. ["PUBLIC SERVICE"], is Middle South Utilities, Inc. ["MSU"], a registered public utility holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79-79z-6 (1986). PUBLIC SERVICE's affiliates or subsidiaries (except wholly owned subsidiaries) are Arkansas Power & Light Company ["AP&L"], Louisiana Power & Light Company ["LP&L"], Mississippi Power & Light Company ["MP&L"], System Energy Resources, Inc. (formerly Middle South Energy, Inc.), Middle South Services, Inc., Electec, Inc. and System Fuels, Inc.

PARTIES BELOW

Petitioner PUBLIC SERVICE was the plaintiff in the district court and the appellant in the Court of Appeals. The defendants-appellees were: The City of New Orleans ["CITY"], The Council of the City of New Orleans ["COUNCIL"], Messrs. Sidney J. Barthelemy, Joseph I. Giarrusso, Wayne M. Babovich, Lambert C. Boissiere, Jr., Michael Early, James Singleton and Bryan Wagner.

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IN THE
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OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, New Orleans Public Service Inc. ["PUBLIC SERVICE"], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 2, 1986.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 782 F.2d 1236 (Randall, J.) and is reprinted in the appendix hereto, p. A-1. *infra.* The amending opinion of the Court of Appeals is reported at 798 F.2d 858 (Randall, J.) and the opinion of the District Court for the Eastern District of Louisiana (McNamara, J.) is unpublished. They are reprinted in the appendix hereto at pp. A-14 and A-35, *infra,* respectively. The Order denying the Motion of the Federal Energy Regulatory Commission ["FERC"] to Intervene to enable it to seek Rehearing En Banc is

unpublished. It is reprinted in the appendix hereto at p. A-33, *infra.*

JURISDICTION

Invoking federal jurisdiction under the Commerce Clause, the Supremacy Clause, the Preemption Doctrine, the Federal Power Act and 42 U.S.C.§ 1983, PUBLIC SERVICE brought this suit in the Eastern District of Louisiana. The Eastern District granted the defendants' Motion to Dismiss. See page A-35, *infra.*

ON PUBLIC SERVICE's appeal, the Fifth Circuit on February 14, 1986 entered a judgment and an opinion reversing the Eastern District's order and remanding the case to the Eastern District for a decision on the merits. See p. A-1, *infra.* Although no petition for rehearing was sought, issuance of the mandate was stayed.[1] The Fifth Circuit on September 2, 1986 entered a judgment and an opinion amending Part IV of its earlier opinion. See p. A-14, *infra.* This petition for certiorari was filed within 90 days of that date.

The jurisdiction of this Court to review the judgment entered by the Fifth Circuit on September 2, 1986 is invoked under 28 U.S.C. §1254(1).

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[1] Remarkably, the mandate was "held" by an instruction issued *ex proprio motu* by a member of the Court who was not on the panel. See p. A-30. No party requested that the mandate be stayed, nor did the Court advise the parties of this action. The stay was continued for more than six months. See p. A-30.

STATEMENT OF THE CASE

PUBLIC SERVICE provides retail electric service only within the City of New Orleans, Louisiana. PUBLIC SERVICE also engages in the production, transmission, wholesale interstate purchase and wholesale interstate sale of electric power.[2] The genesis of this case is an "Opinion and Order Setting Just, Reasonable and Non-Discriminatory Rates," 31 F.E.R.C. (CCH) ¶61,305 (June 13, 1985) ["FERC Opinion No. 234"], issued by the FERC allocating the electricity and costs from Grand Gulf Unit 1,[3] a 1250 megawatt, nuclear-fueled generating station located near Port Gibson, Mississippi, in such a way as to equalize the cost of the Middle South System's investment in nuclear-fueled generating stations among the members of the Middle South System, AP&L, LP&L, MP&L and PUBLIC SERVICE, and their customers in four states, concluding that this resulted in "just, reasonable and non-discriminatory rates." *Id.* at 61,633, 61,654-55. The COUNCIL and the CITY participated vigorously and at great length in those proceedings, but their position, that PUBLIC SERVCE be allocated only 9% of those costs, *id.* at 61,642, was not adopted by the FERC, which allocated nearly twice that amount (17%) to PUBLIC SERVICE. *Id.* at 61,655.

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[2] Each of MSU's wholly-owned operating subsidiaries, PUBLIC SERVICE, AP&L, LP&L and MP&L [referred to collectively as "the Middle South System"], engages in the purchase, sale and transmission at wholesale of electricity in interstate commerce, and in the retail sale of electricity in one or more of the States of Louisiana, Mississippi, Arkansas and Missouri.

[3] Another wholly-owned MSU subsidiary owns a 90% undivided interest in Grand Gulf Unit 1, an interstate power project built in Mississippi by the Middle South System to serve System load. 31 F.E.R.C. (CCH) ¶61,305, at 61,632-33 (June 13, 1985).

PUBLIC SERVICE filed with the COUNCIL an application for recognition in its retail rates of the allocation established by FERC Opinion No. 234 as a legitimate operating expense of PUBLIC SERVICE. Timely recognition of that legitimate operating expense was critical to the financial viability of PUBLIC SERVICE (and, indeed, the entire Middle South System) because in August 1985 PUBLIC SERVICE began to pay its share of the costs allocated to it by FERC Opinion No. 234, approximately $15 million *each* month.[4] When the COUNCIL refused to act timely, PUBLIC SERVICE filed a complaint against the CITY, the COUNCIL and the individual Councilmen requesting, among other things, an order enjoining the defendants to recognize in retail electric rates the FERC-allocated costs associated with Grand Gulf 1 as a legitimate operating cost of PUBLIC SERVICE. This action was not an appeal of a rate case,[5] nor did PUBLIC SERVICE ask the federal court to make rate-making

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[4] This expense each *month* equals or exceeds what PUBLIC SERVICE typically *earns* in an entire *year*.

[5] There are no rate case issues to litigate in this federal court suit -- no question of the cost of capital, the fair rate of return, the rate base, *et cetera*. The only changed condition is a $160 million per year increase in operating expenses. The Fifth Circuit has previously recognized that an increase in operating expenses requires an increase in revenues:

> The utility's earnings, or the amount returned on investment, is its revenues minus its expenses. The utility's rate of return is therefore determined by dividing the utility's total investment by its earnings. Thus, *an increase in a utility's expenses requires a corresponding increase in a utility's revenues in order for the rate of return to remain constant.*

South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1110 (CA5 1984) (Randall, J.) (emphasis added), *vacated on other grounds*, ___ U.S. ___, 106 S.Ct. 2884, 54 U.S.L.W. 3808 (June 9, 1986)(No. 84-870); See also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

decisions. PUBLIC SERVICE only sought prompt enforcement of a federal right: Recognition in retail rates of the FERC-mandated allocation[6] in sufficient time to avoid PUBLIC SERVICE's insolvency.

The district court denied PUBLIC SERVICE's Motion for Preliminary Injunction. Subsequently, the district court dismissed PUBLIC SERVICE's claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), holding that the Johnson Act, 28 U.S.C. §1342, which places statutory limitations on the circumstances in which a federal court can issue injunctions against state orders affecting rates of public utilities, warranted dismissal and that, in any event, *Burford* abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), precluded the District Court's exercise of jurisdiction. See p. A-35.

The Court of Appeals for the Fifth Circuit granted PUBLIC SERVICE an expedited appeal. The FERC filed a brief as *amicus curiae* and presented oral argument in support of the position taken by PUBLIC SERVICE. The Fifth Circuit reversed, ruling that the Johnson Act did not preclude jurisdiction and that abstention was

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[6] Once the FERC allocates costs from utility facilities serving members of an interstate power pool, the "filed rate" doctrine requires that local utility regulators recognize *in full* those costs as legitimate operating expenses of the power pool members for retail rate-making purposes. *Nantahala Power & Light Co. v. Thornburg*, ___ U.S. ___, 106 S.Ct. 2349, 54 U.S.L.W. 4676 (June 17, 1986)(No. 85-568) ["Nantahala"]. While the local regulator might find savings, if any, by which to offset such costs, the costs have to be recognized in full; otherwise the local regulatory agencies "trap" costs in the manner proscribed by this Court in *Nantahala, supra*, 106 S.Ct. at 2359.

inappropriate. See pp. A-12, A-13.[7]

On June 10, 1986, the Fifth Circuit, which had "held" the mandate, advised the parties that it would reconsider Part IV of its opinion and requested letter briefs addressing *Burford* abstention. On September 2, 1986, the Fifth Circuit withdrew Part IV (but only Part IV) of its original opinion and issued its amending opinion,[8] affirming the district court's decision to abstain, and ordering issuance of the mandate "forthwith." See p. A-14. The FERC filed a Motion to Intervene to enable it to seek Rehearing En Banc, which Motion was denied on September 11, 1986. See p. A-33.

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[7] Partly due to that decision and to comments from the district court concerning a companion case, the COUNCIL entered into a partial settlement with PUBLIC SERVICE of the dispute between them, in which PUBLIC SERVICE reserved all of its rights and the COUNCIL reserved all of its rights, including its alleged right to reduce the level of FERC-mandated costs recognized in PUBLIC SERVICE's retail rates pursuant to an inquiry into the prudence of PUBLIC SERVICE's involvement in the Grand Gulf Project and its alleged right to abrogate PUBLIC SERVICE's contracts concerning the Grand Gulf Project (thereby attempting to eliminate all FERC-mandated costs from PUBLIC SERVICE's retail rates). The partial settlement did not contemplate or require that any litigation between the parties be dismissed.

[8] The decision of the Fifth Circuit that PUBLIC SERVICE's "statutorily based preemption claim presents a substantial federal question over which the district court has jurisdiction under 28 U.S.C. §1331" and that the Johnson Act does not deprive the federal court of jurisdiction in this matter, see Parts I, II and III, pp. A-2 through A-12, is now a final decision inasmuch as it was rendered on February 14, 1986, and no timely application for a writ was filed. Sup. Ct. R. Rule 20.4; *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952).

REASONS FOR GRANTING THE WRIT

I.
THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

This case presents an issue that has polarized the Circuits of the United States Court of Appeals, producing widespread conflict among them:

> May a federal court abstain from adjudicating a statutorily based federal preemption claim that presents a substantial federal question where there is no countervailing state interest and which claim is not the subject of a state judicial proceeding?

The Fifth Circuit's decision in this case places it in conflict with the Third, Fourth, Eighth, Ninth, Eleventh, and District of Columbia Circuits on this issue.[9] Presently,

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[9] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (CA3 1986); compare *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W.Va. 1985)(preliminary injunction), *aff'd*, 770 F.2d 159 (CA4 1985), 630 F. Supp. 656 (S.D. W.Va. 1986) (declaratory judgment) with *Aluminum Co. of America v. Utilities Comm'n of N.C.*, 713 F.2d 1024 (CA4 1983), *cert. denied*, 465 U.S. 1052 (1984); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (CA8 1985), *cert. denied sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, ___ U.S. ___, 106 S. Ct. 884, 54 U.S.L.W. 3498 (Jan. 27, 1986) (No. 85-895); *IBEW v. Public Serv. Comm'n of Nev.*, 614 F.2d 206 (CA9 1980); *Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521 (CA11 1983); *Family Div. Trial Lawyers v. Moultrie*, 725 F. 2d 695 (CADC 1984).

eight circuits[10] are in conflict over this issue, which issue is only now flowering into what may become the major legal battleground in utility regulatory matters during the latter half of the 20th century.[11]

The identical abstention issue, involving the same Grand Gulf interstate power project, was presented to the Eighth Circuit. That court held that a federal court should not abstain from adjudicating this federal preemption claim, because "[t]he very premise of this doctrine . . . is lacking when . . . federal law or Constitution makes the proceeding or regulation at issue beyond the state's authority." *Middle South Energy, Inc. v. Arkansas Public Service Comm'n, supra,* at 417.

Thus, the Fifth Circuit's ruling is in direct conflict with that of the Eighth Circuit and with its own prior rulings. See pp. 11-12, *infra.* Further, in abstention cases involving the FERC "filed rate" doctrine, the Third and Fourth Circuits are aligned with the Eighth Circuit and

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[10] The Sixth Circuit is likewise in conflict with the Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits on the issue of abstention in the face of a federal preemption claim. *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n,* No 85-5121, slip op. (CA6 Mar. 24, 1986), *petition for cert. filed,* 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49).

[11] The enormous level of investment in electric generating facilities whose output and costs are subject to the exclusive jurisdiction of the FERC has produced a high stakes contest whereby local regulators withhold recognition of FERC-approved rates until the financial strain on the utility is so great that its choices are capitulation or insolvency. The utilities then "settle" with the local regulatory authority, which thereby "traps" costs previously allocated to the utilities by the FERC. For a discussion of "trapping"costs, see *Nantahala, supra,* at 2359.

have not abstained,[12] while the Sixth Circuit has abstained.[13]

Given the number of large, relatively expensive electric generating facilities scheduled to begin operation within the next decade, this conflict among the circuits will only become more intense. In no fashion is the need for review by this Court made more evident than by the fact that a sister company of PUBLIC SERVICE was able to vindicate its federal rights in federal court merely because it is located in the Eighth Circuit, while PUBLIC SERVICE was not, because it is located in the Fifth Circuit.

II.

THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH SUPREME COURT PRECEDENT.

This Court's decisions hold that an FERC-fixed rate cannot be challenged or altered by another utility, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); by a state court, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *or by a regulatory agency, Nantahala, supra.* Until resolved by this Court, this conflict among Circuits regarding abstention poses a significant threat to federal energy regulatory policy, a threat arising from the utilities' inability to obtain prompt vindication of their federal rights by courts

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[12] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (CA3 1986); *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D.W.Va. 1985), *aff'd*, 770 F.2d 159 (CA4 1985).

[13] *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, No. 85-5121, slip op. (CA6 Mar. 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49).

independent of parochial influence[14] and from local regulators' seeking to shield their constituency from high-cost power. Abstention by a federal court on substantial federal questions such as these is antithetical to the regulatory scheme established by the Federal Power Act, 16 U.S.C. §§791a-828c.

This Court's prior decisions do not permit abstention in the face of a federal preemption claim that raises substantial federal questions. The judicially created doctrine of abstention represents an extraordinary and narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976), and "abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest," *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-89 (1959).

This Court repeatedly has advised the federal courts that a state's interest is not more important than that of a federal regulatory agency acting pursuant to power granted by Congress. By enacting the Federal Power Act, Congress has conferred exclusive jurisdiction over the allocation of costs among interstate power pool members

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[14] Parochial influence on local regulatory decision-making prompted this Court to invalidate local regulatory conduct when it constituted protectionist legislation that "overtly blocks the flow of interstate commerce at a state's borders," *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978), and to hold that "one state in its dealings may not place itself in a position of economic isolation," *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935). See also *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982).

upon a federal regulatory agency, thereby preempting local regulatory action that conflicts with, or does not embrace, the federal regulatory scheme. *Nantahala, supra; Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981); *FPC v. Southern California Edison Co.,* 376 U.S. 205 (1964); *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951).

Relying on this Court's mandate in these and other cases, the Third, Fourth and Eighth Circuits, and previously the Fifth Circuit, properly rejected abstention in cases arising under the Federal Power Act or the Natural Gas Act.[15]

III.

THE FIFTH CIRCUIT MISAPPLIED THE PRINCIPLE ESTABLISHED BY THIS COURT IN *BURFORD v. SUN OIL CO.,* 319 U.S. 315 (1943).

This Court's opinion in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), does not permit abstention in this case. The Fifth Circuit originally, and correctly, rejected abstention on the grounds that the basic premise of *Burford* abstention, "avoiding needless federal court intervention into important matters within a state's jurisdiction to regulate," obviously is lacking in a case in which the claim presented is predicated upon federal preemption. *New Orleans Public Service, Inc. v. City of New Orleans, at*

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[15] *This Court has specifically stated that the pertinent provisions of the Natural Gas Act and the Federal Power Act are "in all material respects substantially identical." Arkansas La. Gas Co. v. Hall,* 453 U.S. 571, 577 n.7 (1981).

p. A-13, (Randall, J.), *citing South Central Bell Telephone Co. v. Louisiana Public Service Commission,* 744 F.2d 1107, 1123 (CA5 1984) (Randall, J.), *vacated on other grounds,* ____ U.S. ____, 106 S.Ct. 2884, 54 U.S.L.W. 3808, (June 9, 1986) (No. 84-870).

The fundamental dispute raised by PUBLIC SERVICE's complaint is not whether the COUNCIL has jurisdiction to regulate, but whether, in setting rates, the COUNCIL must recognize as PUBLIC SERVICE's legitimate operating expenses the Grand Gulf 1 costs determined by the FERC. If the COUNCIL fails to recognize as a legitimate operating expense the FERC-allocated costs, the federal court cannot be said to be intervening in a matter subject to the COUNCIL's jurisdiction because the COUNCIL has no discretion in such matters. *Nantahala, supra,* at 2359. Deference is not given to a state regulatory scheme when its existence conflicts with the federal scheme of regulation. *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963).

This case does not involve resolution of a state law issue. No valid state law permits a local regulatory agency to use or adopt any rate other than that fixed by the FERC. As the Third Circuit acknowledged in *Kentucky West Virginia Gas:* There is "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." 791 F.2d at 1116, *quoting Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978).

In *Burford,* this Court held that a federal court should abstain when called upon to decide issues of *state* law where an erroneous decision might disrupt a complex

state regulatory scheme. The error of the lower courts on the issue of abstention is readily apparent: The complaint in this case asks a federal court to decide *federal*, not *state* issues. In fact, the situation here is exactly opposite that presented in *Burford*: An erroneous decision by a *state* court in this case would disrupt the *federal* regulatory scheme. State courts in four separate jurisdictions might easily disagree among themselves over an issue so fraught with parochial bias.

The Johnson Act, 28 U.S.C. §1342, is a specific Congressional expression regarding the circumstances in which the federal courts must refuse to exercise their jurisdiction over utility matters, i.e., it is the abstention doctrine for utility related cases. Where, as here, a federal court finds jurisdiction but abstains despite that Congressional expression, invoking abstention is tantamount to judicial repeal of the Johnson Act.

IV.

THE FIFTH CIRCUIT MISAPPLIED THE PRINCIPLE ESTABLISHED BY THIS COURT IN *YOUNGER v. HARRIS*, 401 U.S. 37 (1971).

A. THE THREE-PRONG TEST FOR *YOUNGER* ABSTENTION

There is a three-prong test to determine whether a federal court should abstain under the *Younger* doctrine:

1) A state *judicial* proceeding must be ongoing;
2) That proceeding must involve enforcement of important state interests; and
3) The plaintiff must have an opportunity in that proceeding to raise its federal constitutional challenge.

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982).

The Fifth Circuit erred in finding that the facts in this case satisfied this Court's test. This Court has ruled that "*Younger* is not a bar to federal court action when state *judicial* proceedings have not themselves commenced." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238-39 (1984) (emphasis added). Contrary to the Fifth Circuit's amending opinion (see p. A-23), there is not now, nor has there ever been, any state *judicial* proceeding in this case. The proceedings before the COUNCIL are not *judicial* in nature.[16] Accordingly, the first prong of the *Middlesex* test, that there be a pending *judicial* proceeding, is not satisfied.

The second prong of the *Middlesex* test, that the proceedings must implicate important state interests, is likewise not met in this case. Contrary to the Fifth Circuit's amending opinion (p. A-23, A-24), the "important state interest"[17] at stake is not "setting retail rates," a

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[16] A rate proceeding before a local regulatory body in Louisiana is legislative in nature, not judicial. The COUNCIL is the legislative branch of city government; indeed, in response to PUBLIC SERVICE's 42 U.S.C. §1983 claim, the COUNCIL pled legislative immunity as a defense. Further, the law of this Court and of Louisiana is consistent that a local regulator's power to regulate retail rates is a legislative function. *Home Tel. & Tel. Co. v. City of Los Angeles,* 211 U.S. 265 (1908); *Louisiana Gas Serv. Co. v. Louisiana Pub. Serv. Comm'n,* 245 La. 1029, 162 So.2d 555 (1964); *Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n,* 187 La. 137, 174 So. 180 (1937); *McNeely v. Town of Vidalia,* 157 La. 338, 102 So. 422 (1924).

[17] Other frequently recognized indicia of whether a state's interest is "important" within the meaning of the second prong of the *Middlesex* test are whether the state is the plaintiff in the state court action, and whether the state court action was an enforcement, as opposed to a remedial, proceeding. These indicia are not present in this case. The First, Third, Fifth, Sixth and Ninth Circuits have previously held that *Younger* abstention is not appropriate unless the state was the plaintiff in the state court action. *Martori Bros. Distrib's v. James-Massengale,*

process PUBLIC SERVICE has not sought to enjoin. PUBLIC SERVICE has not challenged the COUNCIL's right to determine whether cost savings in other areas may permit some reduction in retail rates. The interest in dispute in federal court was the right of PUBLIC SERVICE to recover FERC-mandated costs, which neither the COUNCIL nor the state courts have authority to alter, and therefore, a matter upon which those state entities "may not entrench." *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111, 1116 (CA3 1986); *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404, 417 (CA8 1985), *cert. denied sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, ____ U.S. ____, 106 S.Ct. 884, 54 U.S.L.W. 3498 (Jan. 27, 1986) (No. 85-895). For these reasons, the second prong of the *Middlesex* test is not met.

The third prong, that there be an adequate opportunity to present the federal claims before the state tribunal, likewise is not met. The legislative branch of municipal government, a non-judicial body, is not an appropriate forum in which to raise federal claims. If an administrative agency, acting in a legislative capacity, were an adequate forum to resolve federal claims, a federal plaintiff would have to exhaust administrative remedies before filing a 42 U.S.C. §1983 claim such as that filed by

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(footnote 17 continued)
781 F.2d 1349, 1356 n.12 (CA9 1986) citing authority from each of those Circuits. The Fifth Circuit has now "declined to adopt" that view. See p. A-22, n.2. The *Younger* abstention cases fall into three principal categories, but all categories involve enforcement rather than remedial proceedings: State criminal proceedings in which the state is the plaintiff, *Younger, supra;* cases that involve or are related to penal statutes or penalties, *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975); cases that involve the state's court system, or in which the state is the plaintiff to exercise rights granted under specific state statutes, *Middlesex, supra.*

PUBLIC SERVICE in this case. That is not the law;[18] the third prong is not met.

There are exceptions to the *Younger* doctrine that preclude its application even if the *Middlesex* test were satisfied. These exceptions include bias by the agency[19]

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[18] The underpinnings of the *Younger* doctrine are that the federal court should abstain absent some specific Congressional intention otherwise. Congressional intention to the contrary is expressed in this case both in 42 U.S.C. §1983, see *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and in the Federal Power Act, 16 U.S.C. §§791-828c (1985). For purposes of dismissal on the basis of *Younger* abstention, without a retention of jurisdiction, the dismissal should be treated as a dismissal under Fed. R. Civ. P. 12(b)(6), and therefore PUBLIC SERVICE's allegations with respect to its §1983 claim should be treated as true. That being the case, PUBLIC SERVICE has made out a prima facie case upon its allegations of bias of the administrative agency, which under *Gibson v. Berryhill*, 411 U.S. 564 (1973), precludes *Younger* abstention, and would not require exhaustion of administrative remedies. See *Patsy, supra; City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934).

[19] A colorable claim of state bias precludes *Younger* abstention. *Gibson v. Berryhill*, 411 U.S. 564 (1973). For reasons analogous to those in *Berryhill*, abstention is improper in this case. In *Berryhill*, the agency was an adverse party that had sued the applicant over the very issue before that agency. Here, the COUNCIL was and is an adverse party before the FERC and the D.C. Circuit over the very issue before it, PUBLIC SERVICE's FERC-allocated costs. In *Berryhill*, the Court found a viable claim that the agency had a financial stake in the matter before it. Here, as in *Berryhill*, the COUNCIL has already created a local utility authority to take over, finance and operate the electric utility business of PUBLIC SERVICE. This viable claim clearly falls within the scope of this Court's decision in *Gibson v. Berryhill*, so as to preclude application of the *Younger* doctrine.

and irreparable injury to the federal plaintiff.[20]

To hold simply that the *Younger* doctrine applies *every* time a state asserts any possible interest would constitute an unwarranted expansion of the doctrine and in this case would effect the judicial repeal of the Johnson Act, 28 U.S.C. §1342. That Act specifically contemplates the exercise by federal courts of their jurisdiction and federal intervention in utility proceedings. Were the *Younger* doctrine expanded so as to encompass utility regulatory proceedings, the Johnson Act would be effectively repealed and federal courts would be required to abstain in every case of that type. The Fifth Circuit's new approach in this case cannot be a correct or proper expansion of the *Younger* doctrine.

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[20] This Court settled that a utility can show irreparable harm or injury as a result of loss through exhaustion of the very right it seeks to protect -- the right to be free of a local administrative proceeding on matters beyond its authority. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (decision on preemption of state nuclear-waste disposal law should not be delayed because postponement "would likely work substantial hardship on the utilities"); *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (court upheld an injunction against the local regulatory authority on the grounds that the utility suffered injury from the mere fact that it might have to obtain local agency approval of the reasonableness of charges previously addressed by the federal regulatory agency); and *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.")

CONCLUSION

In a case in which several federal courts of appeals are in direct conflict, in which a federal court has failed to follow Supreme Court precedent, in which neither the *Burford* nor the *Younger* abstention doctrines properly apply because there is no countervailing state interest, and where the effect of abstaining is to judicially repeal a federal statute, a writ of certiorari must issue.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

v.

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 14, 1986)

Before RANDALL and WILLIAMS, Circuit Judges, and HINOJOSA,* District Judge.

RANDALL, Circuit Judge:

Appellant New Orleans Public Service, Inc. appeals the district court's dismissal of this cause of action for lack of subject matter jurisdiction and the district court's decision to abstain. We reverse and remand.

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* District Judge of the Southern District of Texas, sitting by designation.

I.

Appellant New Orleans Public Service, Inc. ("NOPSI"), a subsidiary of Middle South Utilities Inc. ("MSU"), provides electric services to most of the City of New Orleans. NOPSI also engages in the production, wholesale interstate purchase, wholesale interstate sale and retail sale of electric power. The genesis of this case is an "Opinion and Order Setting Just [sic]Reasonable and Non-Discriminatory Rates," 31 F.E.R.C. (CCH) ¶ 61,305 (June 13, 1985) ("Opinion No. 234"), issued by the Federal Energy Regulatory Commission ("FERC"), allocating the cost of Grand Gulf Unit One, a 1250 megawatt nuclear power plant located in Port Gibson, Mississippi, among four MSU subsidiaries: Arkansas Power & Light Co.; Louisiana Power & Light Co.; Mississippi Power & Light Co.; and NOPSI.[1] NOPSI's share of the costs was 17%. In July 1985, NOPSI accordingly began paying its 17% of the costs, 15.5 million dollars a month.

On May 17, 1985, NOPSI filed an application for a permanent rate increase with Appellee Council for the City of New Orleans ("the Council"). On July 25, 1985, the Council entered a resolution requiring NOPSI to refile its application and directing NOPSI to file a request for interim rate relief. Emergency interim relief was granted by the Council on September 5, 1985. In its interim relief order, the Conncil directed NOPSI to freeze electric rates until further regulatory action. The Council noted that NOPSI's immediate cash flow problems could be alleviated by NOPSI's issuance of 35 million dollars in securities

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[1] Opinion No. 234 is presently the subject of a direct appeal in the D.C. Circuit.

pending the approval of the Securities and Exchange Commission; the repayment of 32 million dollars in cash advances made by NOPSI to an MSU subsidiary; and the continued omission of NOPSI's dividend payments on common stock to MSU.

NOPSI sought injunctive relief from the Council's order in the district court. NOPSI first raised a statutorily-based preemption claim. NOPSI alleged that the Council, in setting NOPSI's retail rates, had refused to recognize the expenses NOPSI was required to pay by FERC order: the Council's rate freeze assumed in essence that the FERC opinion had never been issued, and that NOPSI was obtaining no Grand Gulf Unit I power. The refusal to recognize FERC-determined wholesale costs for retail rate-making purposes frustrated the FERC order allocating costs, thereby violating FERC's exclusive authority to regulate wholesale energy under the Federal Power Act, 16 U.S.C. §§ 824-824K. NOPSI also claimed that the Council's refusal to honor the FERC order constituted an impermissible burden on interstate commerce, as NOPSI would be rendered insolvent; the FERC order allocating costs among companies in several states would be frustrated; financial agreements among the MSU companies would be harmed; the operation of Grand Gulf Unit One would be threatened; and the viability of the interstate integrated electric system would be seriously undermined.

The district court dismissed NOPSI's claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), because of the Johnson Act, 28 U.S.C. § 1342. The Johnson Act places statutory limitations on the circumstances in which a federal court can issue injunctions against state orders affecting rates of public utilities. The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearings; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

If all four criteria of the Johnson Act are met, the Act will bar federal jurisdiction. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107, 1123 n.28 (5th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3449 (Nov. 30, 1984) (84-870). NOPSI contended that the first two criteria of the Johnson Act -- that jurisdiction be based solely on diversity of citizenship or repugnance of the order to the Federal Constitution, and that the order not interfere with interstate commerce -- had not here been met, and that the district court thus had jurisdiction over the case.[2]

The district court found otherwise. Although NOPSI's complaint had claimed federal question jurisdiction

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[2] NOPSI does not on appeal address the applicability of the third and fourth criteria of the Johnson Act, but confines itself to disputing the applicability of the first and second criteria. Appellant's Brief at 40. Thus, we will not consider whether the third and fourth criteria of the Johnson Act here apply.

under 28 U.S.C §§ 1331, the district court did not address whether NOPSI had presented a federal question arising under a federal law, but instead discussed the applicability of a particular jurisdictional provision of the Federal Power Act, § 825p, a provision which serves to reinforce the general jurisdictional provisions governing the federal district courts. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 257 (1951) (Frankfurter, J., dissenting). Under § 825p of the Federal Power Act, federal district courts have exclusive jurisdiction over actions "brought to enforce any liability or duty created by or to enjoin any violation" of a FERC opinion or order.[3] Although NOPSI asserted that the FERC opinion created a "duty" on the part of the Council to pass through to its retail rate payers the costs incurred by NOPSI as a result of its 17% FERC cost allocation, the district court's own review of the FERC opinion convinced the court that no "duty" had been created therein. There was no mandate to pass through the expenses allocated by FERC; indeed, "such a provision [was] conspicuous by its absence." Record Vol. 2 at 330. The FERC opinion merely prescribed the interstate wholesale rates that NOPSI would have to pay for its share of Grand Gulf Unit I energy. Given its interpretation of the FERC opinion, the district court found that jurisdiction under § 825p of the Federal Power Act was lacking, and apparently also reasoned that NOPSI _____

[3] Section 825p provides in relevant part:

> The District Courts of the United States, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

could not sustain its statutorily-based claim of federal preemption. Without this statutorily-based claim, jurisdiction rested "solely" on "repugnance of the order to the Federal Constitution," satisfying the first criterion of the Johnson Act. The district court also found that the Council's order did not interfere with interstate commerce, satisfying the second criterion of the Johnson Act. Because the district court concluded that the two Johnson Act criteria challenged by NOPSI had been met, federal jurisdiction was precluded.

Finally, the district court observed that even if it were to find that the Johnson Act did not bar adjudication of NOPSI's request for relief from the Council's regulatory authority, the jurisprudential doctrine of abstention would dictate a similar result. Citing *Burford v. Sun Oil*, 319 U.S. 315 (1943), the district court concluded that it should exercise a "hands-off policy" in reference to the Council's local rate-making.

II.

NOPSI on appeal contends that the district court erred in dismissing this case for lack of subject matter jurisdiction. We agree. In dismissing this case, the district court first considered NOPSI's claims within the jurisdictional grant of 16 U.S.C. §825p. As discussed above, the district court found from its own review of the FERC opinion that a pass through of NOPSI's costs was not explicitly mandated therein, and was in fact "conspicuous by its

absence," thereby precluding jurisdiction under § 825p.[4] We need not and do not decide, however, whether the federal court had jurisdiction of this matter under § 825p, for federal jurisdiction over NOPSI's statutorily-based preemption claim can be sustained under a different jurisdictional grant: 28 U.S.C. § 1331. Section 1331 provides for federal jurisdiction over questions "arising

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[4] We need not now decide whether the FERC opinion contemplates a pass through of costs to retail rate payers. We note that FERC adopted the cost allocation recommended by the administrative law judge below, and in so doing commented approvingly that the judge had "concluded that the costs of Grand Gulf capacity and energy should be shared equitably by all four operating companies *and their customers.*" Record Vol. 1 at 35 (emphasis added). Both NOPSI and FERC, writing here as amicus curiae, contend that the FERC opinion thus allocated the Grand Gulf Unit One costs to NOPSI *and its customers,* thereby preempting contrary local action and mandating Council recognition and pass through of the costs. Certainly the above quoted language would call into question the district court's conclusion that a pass through provision is "conspicuous by its absence." Moreover, a recent D.C. Circuit opinion, while addressing an issue different from that raised by NOPSI here, encountered no difficulty in construing the same FERC opinion before us today, Opinion No. 234, to "impose [upon] Arkansas Power and Light Company *(and hence upon its rate payers)* a thirty-six percent share of the cost of the Grand Gulf Nuclear Plant." *Reynolds Metals Company v. FERC,* 777 F.2d 760 (D.C. Cir. 1985) (emphasis added) (dismissing as premature an emergency petition and motion for stay seeking relief from FERC refusal to include refund obligation in order and denying injunction sought by major customer of electric utility as FERC retained authority to order refunds). Finally, at least one Circuit has held that § 825p does not require an undisputed violation of a clear FERC opinion before jurisdiction may be assumed by the district court. Rather, parties may heatedly dispute the effect and interpretation to be given a FERC opinion and still obtain federal jurisdiction under § 825p *State of California v. Oroville-Wyandotte Irrigation District,* 411 F. Supp. 361 (E.D. Ca. 1975), *aff'd,* 536 F.2d 304 (9th Cir.), *cert. denied,* 429 U.S. 922 (1976) (finding jurisdiction under 16 U.S.C. § 825p even where there was a conflict in the way different agencies interpreted the effect of decisions by the FPC [precursor to FERC] and the California Public Utilities Commission, and concluding ultimately that the two decisions did not conflict).

under" a federal law.[5] As noted by the Supreme Court, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Board v. Construction Laborers Trust,* 463 U.S. 1, 8 (1983). However, an action may "arise under" federal law when "in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law." *Id.* at 9 (quoting P. Bator, P. Mishken, D. Shapiro & H. Wechsler, *Hart & Welchsler's The Federal Court's and the Federal System* 889 (2d ed. 1973)). Indeed, the Supreme Court has recently observed that a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines Inc.,* 463 U.S. 85, 96 n.14 (1983). Of course, to avoid dismissal under Fed. R. Civ. P. 12(b)(1), the question presented must be "substantial." A complaint's allegations are "insubstantial if they are obviously without merit or if prior decisions foreclose controversy on the subject." *In re Carter,* 618 F.2d 1093, 1103 (5th Cir. 1980), *cert. denied,* 450 U.S. 949 (1981). So rigorous is the test for dismissal under Rule 12(b)(1) that if there is "any foundation of plausibility to the claim, federal jurisdiction exists." *Meason v. Bank of Miami,* 652 F.2d 542, 547 (5th Cir. 1981), *cert. denied,* 455 U.S. 939 (1982) (quoting 13 C. Wright & Miller, *Federal Practice & Procedure* § 3564 at

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[5] 28 U.S.C. §1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

428 (1975)). We now turn to consider NOPSI's statutorily-based preemption claim.

NOPSI's preemption claim does not depend, as the district court seemed to think, upon an explicit FERC mandate to pass through costs. Rather, NOPSI contends that the Council's refusal to recognize the FERC-determined wholesale costs intrudes upon and frustrates the FERC determination in violation of Congress' intent that exclusive authority over wholesale rates be vested with FERC under the Federal Power Act. In 1935, with Part II of the Federal Power Act, 16 U.S.C §§ 824-824k, Congress "delegated to the Federal Power Commission [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). The 1935 enactment was a "direct result" of the Supreme Court's holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), "that the states lacked power to regulate the rates governing interstate sales of electricity for resale." *New England Power Co.*, 455 U.S. at 340. Congress created a "bright line" between federal and state jurisdiction, denying "state power to regulate a sale 'at wholesale to local distributing companies' and allow[ing] state regulation of a sale at 'local retail rates to ultimate consumers.' " *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964) (quoting *Illinois National Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942)). The exclusive authority granted FERC over wholesale rates led the Supreme Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951), a case which itself invoked the federal question jurisdiction of 28 U.S.C.

§ 1331, to rule that "the right to a reasonable rate is the right to the rate which [FERC] files or fixes, and . . . the courts can assume no right to a different one." Invoking the reasoning of *Montana-Dakota*, NOPSI argues that the states, like the courts, must recognize FERC-determined wholesale rates. In sum, NOPSI contends that the preemptive effect of the Federal Power Act and the *Montana-Dakota* holding forbid the states from intruding upon an area determined by Congress to be within the exclusive jurisdiction of FERC: the setting of wholesale costs.

NOPSI cites several state Supreme Court cases to support its preemption argument. *See Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978) (finding that the rate increase in the cost of electricity to Narragansett constituted a reasonable operating expense and should be so viewed by the local rate-making authority); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981) (holding that for purposes of fixing intrastate rates, the doctrine of federal preemption required the local Public Service Commission to treat the interstate wholesale rate filed with FERC as a reasonable operating expense); *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.) *cert. denied*, 104 S. Ct. 3546 (1984) (holding that the Minnesota Public Utilities Commission was required to recognize the losses under a FERC-determined wholesale rate as expenses for power purchased in determining retail rates to be charged to Minnesota rate payers and noting that in general regulators have allowed recovery of such costs through retail rates). In addition, in *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F. Supp. 64 (S.D. W.Va. 1985), the plaintiff power

company, like NOPSI here, sought injunctive relief to enjoin the local regulatory commission from denying the company recovery of costs to be incurred under a FERC order. The plaintiff claimed that the FERC order preempted the commission's refusal to pass through the costs. The district court agreed. Basing its subject matter jurisdiction in part upon 28 U.S.C. § 1331, the district court granted the injunctive relief sought, finding that the local commission had infringed upon "the FERC's exclusive authority to regulate the transmission and sale of energy in interstate commerce." *Id.* at 73.

Given the above, we find that absent application of the Johnson Act, NOPSI's statutorily-based preemption claim presents a substantial federal question over which the district court has jurisdiction under 28 U.S.C. § 1331. However, we do not decide, as NOPSI contends we must, whether NOPSI will prevail in its preemption claim. Achieving federal jurisdiction does not guarantee success on the merits of a claim. *See Montana-Dakota*, 341 U.S. at 249. We therefore do not determine whether the Council must immediately pass through NOPSI's costs. Indeed, the *Narragansett* case, on which NOPSI so heavily relies, did not itself require immediate pass through of costs to retail rate payers, but held instead that "we do not order the local commission to automatically adjust the retail rates . . . . [W]e remand the case to the [local commission] with the direction that no matter what method it adopts in considering Narrangansett's [sic] proposed rate increase it must treat the FPC filed and bonded purchase price to NEPCO as an actual operating expense." 381 A.2d at 1363.

III.

We now must determine whether the Johnson Act applies to bar federal jurisdiction over NOPSI's claim. We conclude that it does not. The Johnson Act removes federal jurisdiction of claims which rely "solely" on "repugnance of the order to the Federal Constitution." As NOPSI's claim raises a federal question about the preemptory effect of the Federal Power Act, it cannot be seen to rely "solely" on constitutional grounds. A statutorily-based preemption claim will not provide a basis for invoking the Johnson Act to deprive the federal courts of jurisdiction. *See International Brotherhood of Electric [sic] Workers v. Public Service Commission of Nevada*, 614 F. 2d 206 (9th Cir. 1980) (finding that although a challenge to a local rate order based on statutory preemption could be regarded as constitutional for some purposes, it would not be so seen for purposes of the Johnson Act, for jurisdiction was not based solely on repugnance of the order to the Federal Constitution, but rested in part upon proper interpretation of a federal statute and on general federal question jurisdiction); *Aluminum Company of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) (refusing to apply the Johnson Act as a bar to federal jurisdiction when jurisdiction was based upon federal questions and preemption). As we find that the first criterion of the Johnson Act -- that jurisdiction be based solely on repugnance of the order to the Federal Constitution -- has not here been met, we hold that the district court erred in applying the Johnson Act to bar its jurisdiction.[6]

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[6] As noted above, for federal jurisdiction to be barred by the application of the Johnson Act, all four criteria of the Act must be met. Because we find that the first criterion has not here been met and conclude therefore that the Johnson Act was wrongly applied to NOPSI's claims, we need not consider whether the second criterion of the Act -- that the order not interfere with interstate commerce -- has or has not also been met.

IV.

Finally, we find that this case is not an appropriate one for abstention. The doctrine of abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate controversies properly before it." *County of Allegheny v. Frank Mastruda Co.*, 360 U.S. 185, 188-89 (1959). The *Burford*-type abstention invoked by the district court below is appropriate when a case involves an essentially local issue arising out of a complicated state regulatory scheme. *See International Brotherhood of Electric [sic] Workers*, 614 F.2d at 213. When Congress has created a statutory scheme, such as the Federal Power Act, which arguably preempts the local regulation complained of, a fundamental element of *Burford* abstention is thrown into doubt, for we must question whether the case indeed involves an essentially local issue. When the claim presented is predicated upon federal preemption, "it is well established that 'the basic premise of abstention -- avoiding needless federal court intervention into important matters within a State's jurisdiction to regulate -- obviously is lacking.' " *South Central Bell Telephone*, 744 F.2d at 1123 (quoting *Aluminum Co. of America*, 713 F.2d at 1030). We therefore find that the district court erred in abstaining, and remand this case to the district court for decision on the merits.

For the above reasons the order of the district court dismissing this case for lack of subject matter jurisdiction and on abstention grounds is REVERSED and REMANDED for decision on the merits.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

v.

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(September 2, 1986)

Before RANDALL and WILLIAMS, Circuit Judges, and HINOJOSA*, District Judge.

RANDALL, Circuit Judge:

After reconsidering our opinion in *New Orleans Public Service, Inc. v. The City of New Orleans,* 782 F.2d 1236 (5th Cir. 1986), we have decided to withdraw Part IV of our opinion, and substitute in its place the following:

* District Judge of the Southern District of Texas, sitting by designation.

IV.

The district court concluded that the jurisprudential doctrine of abstention barred adjudication of NOPSI's request for relief from the Council's regulatory authority. Although we recognize that abstention in the face of a federal preemption claim is, at a minimum, problematical, we conclude on the facts before us that the district court did not abuse its discretion by abstaining in the instant case.

Our conclusion that the district court properly exercised its discretion is informed by the particular structure of the Federal Power Act. As noted in our initial opinion in this case, with Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, Congress in 1935 "delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). This 1935 enactment was a "direct result" of the Supreme Court's holding in *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U.S. 83 (1927), "that the states lacked power to regulate the rates governing interstate sales of electricity for resale." *New England Power Co.*, 455 U.S. at 340. The Federal Power Act, however, explicitly denied FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). Congress created a "bright line" between federal and state jurisdiction, denying "state power to regulate a sale 'at wholesale to local distributing

companies' and allow[ing] state regulation of the sale at 'local retail rates to ultimate consumers.' " *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964) (quoting *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942)). *Cf. Louisiana Public Service Commission v. F.C.C.*, 106 S. Ct. 1890 (1986) (discussing dual system of state and federal regulation over telephone service embodied by Communications Act of 1934; concluding that Act did not preempt state regulation over depreciation of dual jurisdiction property for intrastate rate making purposes).

The existence of this "bright line" colors the way we view a preemption claim involving the Federal Power Act. NOPSI has attempted to depict the situation before us as one in which the Council is stepping into the realm of *wholesale* rate making, a field under the exclusive jurisdiction of FERC. NOPSI focuses on the disruption of a *federal* scheme. Yet federal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states. While the recent Supreme Court case of *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986), required that the local council recognize the FERC-determined wholesale costs, local control over retail rate making is not preempted by federal law: *Nantahala* recognizes that retail rates need not necessarily be increased to reflect the corresponding increase in wholesale rates set by FERC. Instead, local councils are permitted the autonomy preserved to them by the Federal Power Act and can consider cost savings in other areas relevant to the setting of retail rates. 106 S. Ct. at 2357-58.

Thus, under the Federal Power Act, the wholesale rates set by FERC, although a matter of national concern, are effectuated at the retail level only by local institutions. The structure of the Federal Power Act, preserving as it does state jurisdiction over retail rates, suggests that these local institutions should normally proceed unfettered by federal interference. Although we do not intimate that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion, abstention should perhaps more often obtain in cases presenting a question of preemption under the Federal Power Act than would be so in cases presenting other types of federal preemption claims.

In deciding to abstain, the district court focused upon a variant of abstention known as *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), concerned an attack upon the validity of an order of the Texas Railroad Commission granting a permit to drill oil wells. Jurisdiction of the federal district court was invoked because of diversity and a federal due process claim. Although federal jurisdiction was assumed to exist, the Supreme Court nevertheless agreed with the district court's decision that it should decline to exercise such jurisdiction. The Supreme Court explained that the Texas regulatory system governing oil conservation was complex and a matter of great public importance. The Court noted that Texas had established in its own state courts a system of "thorough judicial review" of the Railroad Commission's orders and that this review system was concentrated in the state courts of Travis County. 319 U.S. at 325. Texas courts were perfectly capable of giving relief. Should the federal courts exercise their jurisdiction, delay, confusion and "needless federal conflict with the state policy [would be]

the inevitable product of this double system of review." *Id.* at 327. Moreover, ultimate review of the federal questions remained fully preserved in the United States Supreme Court. *Id.* at 334.

Later, in *Alabama Public Service Commission v. Southern R. Co.*, 341 U.S. 341 (1951), the Supreme Court determined that abstention was required in a challenge to a state Railroad Commission order. The plaintiff railroad in this case had been denied permission by the state commission to discontinue intrastate passenger service. The railroad filed suit in federal court, basing jurisdiction on diversity and a federal claim of confiscation. To support its invocation of abstention, the Supreme Court reasoned:

> As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor then [sic] the avoidance of needless friction with state policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.

341 U.S. at 349 (citations omitted).

Burford and *Alabama Public Service Commission*, while resting federal jurisdiction in part upon federal questions, also involved questions of state law. Although NOPSI argues that these abstention cases can thus be distinguished from the instant case, where no state law issue seems relevant, we find that the absence of a state law claim in the instant case is not fatal to *Burford* abstention. The motivating force behind *Burford* abstention is not the desire to avoid a state law question, but rather, a reluctance to intrude into state proceedings where there exists a complex state regulatory system. As we have previously observed, "*Burford*-type abstention requires neither the presence of a state issue nor unclarity in pertinent state law. Rather, a court abstaining under *Burford* relegates a federal issue to state court adjudication because the federal issue touches some overriding state interest." *B.T. Inv. Managers v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977).

Given the facts before us and the structure of the Federal Power Act, which leaves jurisdiction over retail rates to the states, we conclude that the district court did not abuse its discretion in finding *Burford* abstention appropriate here. As with the regulatory scheme at issue in *Burford*, the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District Court for the Parish of Orleans. Significantly, NOPSI has not denied that adequate state court remedies exist. That the state courts often capably address claims such as that raised by NOPSI is apparent

from the number of state court cases upon which NOPSI relies to prove its preemption claim substantial. Nor would federal abstention foreclose the United States Supreme Court from entertaining NOPSI's preemption claim should it wind its way up through the state courts, as is demonstrated by the path of the recent Nantahala case.[1]

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[1] The question of *Burford* abstention in the face of a preemption claim involving the Federal Power Act has led the circuit courts to various results. In *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), Alcoa and Tapoco sought an injunction from the federal district court against a local council order which considered Alcoa subsidiaries to be a single system for purposes of calculating the rate base. Alcoa and Tapoco claimed that the order "allegedly interfere[d] with the operation of a federal regulatory scheme and impermissibly burden[ed] interstate commerce." 713 F.2d at 1025. The district court abstained. The Fourth Circuit affirmed, explaining that the case involved the "quintessential *Burford* setting of a complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded." *Id.* at 1029. The court continued: "The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of North Carolina's domestic policy." *Id.* The court declined to adopt a *per se* rule against abstention whenever a federal plaintiff asserted a preemption claim. In *American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. Mar. 24, 1986), a public utility company challenged a local commission's rate order in both state and federal courts. FERC had accepted a unit power agreement as a rate schedule. When the utility company tried to pass through its cost to retail rate payers, the local commission balked, refusing to increase retail rates. The *per curiam* opinion of the court rejects *Burford* abstention in favor of *Younger* abstention. However, the two concurring opinions by Judges Contie and DeMascio invoke *Burford* abstention, noting that although *Burford* did involve the review of a state law question, the Supreme Court focused not on the presence of this state law issue, but instead on the disruption of a state policy. Here, as in *Burford*, there existed a complex state regulatory scheme which would be disrupted by federal court review, and there also existed a state created forum with expertise.

Not all courts facing preemption claims have chosen to abstain. Perhaps the strongest argument against abstention can be found [sic] a footnote in a Ninth Circuit opinion, which notes, "[i]f a preeemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate."

Moreover, on these facts, abstention seems appropriate under the doctrine of *Younger v. Harris*, 401 U.S.

(footnote 1 continued)

International Brotherhood of Electric [sic] *Workers, Local Union No. 1245 v. Public Service Commission of Nevada*, 614 F.2d 206, 212 n.1 (9th Cir. 1980). Although the Ninth Circuit's language is strong, it must be noted that the case does not involve the Federal Power Act with its preservation of state jurisdiction over retail rates. In addition, the court's apparent *per se* rule against *Burford* abstention appears to be unneccessary [sic] dictum in the context of the case, where no state policy was at issue, and where federal review would not disrupt the state regulation.

Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission, 791 F.2d 1111 (3rd Cir. 1986), involved the Pennsylvania statutory framework under which retail rates were established for natural gas companies. One utility company sought to pass through the costs passed onto it by FERC-approved tariffs, and the local utility council denied the pass through. The company brought suit in state and federal courts, alleging to the federal district court that the local order and the Pennsylvania statute were preempted by the Natural Gas Act. The district court abstained. Relying in part on our prior opinion in this case, the Third Circuit reversed, reconciling its opinion with *Aluminum Co.* by noting that the case before it raised a direct conflict between state and federal statutes. Finally, in the recent case of *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986), Middle South Energy sought the issuance of an injunction which would prevent the state public service commission from conducting further proceedings into the utility's contracts regarding the purchase of nuclear power. The same FERC order at issue in the instant case had assigned the cost of a nuclear power plant amongst four companies. The state commission did not refuse to recognize the FERC-determined costs, but instead tried to avoid the underlying contracts to purchase nuclear power. The Eighth Circuit refused to abstain, reasoning that abstention is inappropriate when the proceeding -- the commission's attempt to void the underlying contracts to purchase nuclear power -- is beyond the state's authority. *Middle South Energy* can be distinguished from the instant case, as NOPSI is not alleging in the instant suit that the Council's proceeding is beyond its authority. No one disputes that the Council can set retail rates. NOPSI only asks that the Council recognize FERC-determined costs within the Council's rate-making proceeding.

37 (1971).[2] *Younger* and its progeny "espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). The doctrine is driven by:

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

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[2] *Younger* abstention is most typically invoked in situations where the state has initiated an action against a state defendant who subsequently seeks federal relief – a procedural model which NOPSI does not fit. The Third Circuit has concluded that unless the state has initiated the state proceeding, the state interest is not sufficiently important to justify abstention. *Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir. 1978). This view, however, has been "vigorously criticized," 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4254 at 216 (Supp. 1986), (hereinafter "Wright and Miller"), and we decline to adopt it. Rather, we agree with a recent commentator that "state initiation of the proceeding is a poor measure of the state interest" in its substantive policies. Comment, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 Calif. L. Rev. 1318, 1344 (1979). Thus, we do not find the procedural posture of NOPSI in the state proceeding to defeat the application of *Younger* abstention. We find support for our conclusion in *American Electric Power Co.*, where the Sixth Circuit abstained under *Younger* in circumstances similar to ours, despite the fact that the federal plaintiff was procedurally also a plaintiff in the pending state action. *But see Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3d Cir. 1986) (court refuses to abstain under *Younger* in part because the federal plaintiffs had been state plaintiffs below).

Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975) (quoting *Younger*, 401 U.S. at 44). Although originally applied to pending state criminal prosecutions, "[t]he policies underlying *Younger* are fully applicable to non-criminal judicial proceedings when important state interests are involved." *Middlesex*, 457 U.S. at 432. As the Supreme Court has recently emphasized, abstaining from a pending administrative proceeding against a school, "it is perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending state proceedings in state courts is not to issue such injunctions." *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 2723 (1986) (quoting *Younger*, 401 U.S. at 45). *Younger* abstention can be applied to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings, the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Commission*, 106 S. Ct. at 2723. We thus must answer three relevant questions: (1) whether the state proceedings "constitute an ongoing state judicial proceeding;" (2) whether the proceedings "implicate important state interests;" and (3) whether there is "an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex*, 457 U.S. at 432.

Turning our attention to these inquiries, we find that the administrative proceeding before the Council constitutes an ongoing judicial proceeding under *Middlesex* and *Ohio Civil Rights Commission*, as it is appealable to the Civil District Court for the Parish of Orleans, and is thus "within the appellate jurisdiction" of the Louisiana courts. *Ohio Civil Rights Commission*, 106 S. Ct. at 2723. The interest of the Council of New Orleans in setting retail

rates is clearly important here: indeed, jurisdiction over retail rates is preserved to the states by the terms of the Federal Power Act. Finally, we find that through the appellate process, NOPSI would have a full and fair opportunity to litigate its federal claims. As in *Ohio Civil Rights Commission*, NOPSI cites no authority indicating that state review cannot be had of its claims. 106 S. Ct. at 2724. As there is no "bad faith, harrassment [sic] or other exceptional circumstances" which dictate to the contrary, the district court's decision to abstain could be grounded on *Younger*.[3]

For the above reasons, we conclude that the district court's decision to abstain on the instant facts was a proper exercise of discretion. Given the above, our initial opinion reversing the district court is withdrawn in part, and the order of the district court dismissing NOPSI's claim is AFFIRMED. The mandate shall issue forthwith.

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[3] In addition, the Council at the time NOPSI sought injunctive relief from the district court had not yet taken any definitive action on NOPSI's May 17, 1985 rate increase application. Concerns of federalism lead us to treat challenges to anticipated state agency action "with special skepticism." Wright and Miller § 3532.6. In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952), the Supreme Court refused to address the merits of a claim it described as seeking a declaratory judgment for the purpose of "*guard[ing] against the possibility* that [the local commission] would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission" (emphasis in original). The Court observed:

> as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or has no purpose at all.

Id. at 247.

APPENDIX C

TITLE: NOPSI -vs- CITY OF NEW ORLEANS, ET AL.,
No. 85-3654

1. RECORD, EXHIBITS AND BRIEF INFORMATION

Reporter's Ack. due _____
Transcript due * **ON FILE**

Partial Record or Cert. List
OCT 31, 1985 Record on Appeal *10/28 R.M.
No. of Vols. *5
_____Supp. Record No. of Vols._____
_____Second Supp. Record No. of Vols._____
_____ Third Supp. Record No of Vols._____
OCT 31 1985 Exhibits *2 Env. *1 Box. ☐Pkg. ☐Roll
_____Exhibits ☐Env. ☐Box ☐Pkg.
☐Roll
_____Appendix ☐(P) ☐(M)
NOV 14 1985 Record Excerpts
_____Supp. Certified List
_____Briefing Notice Issd. *10/31
NOV 14 1985 Brief for Appellant _____
_____Brief for Appellant _____
_____Brief for Appellant _____
_____Brief for Appellant _____
12/16/85 Brief for Appellee *(J)_____
_____Brief for Appellee _____
_____Brief for Appellee _____
_____Brief for Cr. Appellee _____
*12-23-85 Reply Brief for Appellant *(J)_____
_____ Reply Brief for Appellant _____
12/20/85 Amicus-St. of La. *(J)_____

* **Handwritten Material.**

APPENDIX C

_____Supp. Brief for Appellee _____

11-25-85 Brief for Amicus ***FERC-(RT) 11-29-85 (RT)(J)**

_____Intervenor _____

_____Rule 28(j) letter-Appellant _____

_____Rule 28 (j) letter-Appellee _____

NOV 26 1985 ***Brief for Amicus (Middle South Energy)**

12/20/85 ***Amicus-Ms. Pub. Ser. (J)**

12/23/85 ***Amicus-Nat'l Assoc. State(J)**

***10-31-85** ***1 Box of Exhs.-Extra Copies**

Miscellaneous Filings | Filing:

***10-22-85** Dup. Notice of Appeal and Clerk's Statement of Docket Entries

_____Papers Trans. from Misc No. _____

_____Order of DC Granting appeal IFP

_____Order of DC Appointing Counsel

_____Affidavit of Financial Status

_____CJA 20 Issd. /Voucher Recd. _____

AGENCY REVIEW CASES | Filing:

_____Petition for Review of Order ( ) of
☐NLRB ☐FERC ☐ICC ☐

_____Application for Enforcement-NLRB

_____Answer to Application for Enforcement

_____ Cross Application for Enforcement

*** Handwritten Material.**

4. EXTENSION FLG. Motion for:	Order Fld.	Ext. to:
_____Transcript _____		
_____Transcript _____		
_____Transcript _____		
_____Appellant's Brief _____		
_____Appellant's Brief _____		
_____Appellant's Brief _____		
_____ _____		
_____Appellee's Brief _____		
_____Appellee's Brief _____		
_____Appellee's Brief _____		
_____ _____		
_____Reply Brief _____		
_____ _____		
_____ _____		
_____ _____		

5. CALENDAR INFORMATION

Special Panel _____

Summary Panel: _____

*11-29-86 Case Assigned for *1-9-86 in

☐EB *☑W ☐E ☐_____

_____Case Cont'd for Reassignment _____

_____Case Reassigned for _____ in

☐EB ☐W ☐E ☐ _____

Hearing Panel: *CDR-JSW-Himtsa (sic)

*1-9-86 Case Argued *☐by Appellant *☑by Appellee ____

_____Case Sub. w/o Arg. ☐by Appellant

☐by Appellee

_____

* Handwritten Material.

6. OPINION INFORMATION *P☑ NP☐

2/14/86 Opinion Rendered

☐ Affirmed ☐ _____

CDR Reversed _____

☐ Affd. in Pt. ☐PC ☐Conc. Spec.

☐ Vacated [XX] Signed ☐Dis.

☐ Dismissed ☐Rule 47.6 Dis. in Pt.

_____Opinion Withdrawn _____

*Issued in T. form ;p3654

7. REHEARING INFORMATION

_____Mot. for Ext.-Ext. to: _____

_____Mot. for Ext.-Ext. to: _____

_____Petition for Rehearing _____

☐Appellant ☐Appellee ☐Reg. ☐En Banc

_____Petition for Rehearing _____

☐Appellant ☐Appellee ☐Reg. ☐En Banc

_____Response of _____

_____Order Denying Rehearing

☐ Dissenting

_____ ☐ Opinion S9

_____ ☐ Order on Petition for Rehearing S9

* Handwritten Material

85-3654

8. MOTIONS

Filing Motion to or for:

_____Mandamus

_____Reinstate Appeal

_____Stay Further Proceedings in CA

_____Stay Pending Appeal

_____Injunction Pending Appeal

_____Consolidate Appeals W/

_____Leave to Appeal IFP

_____Bail Pending Appeal

_____Withdraws as council

_____Appointment of Counsel

_____Supplement Record

_____Expedite

*12-12-85 File Brief in Excess *Sub AT Pgs.

*appellee-(75)

*GRANTED by AT 12-13-85

_____File Brief in Excess Pgs.

_____Dismiss by Appellant

_____Dismiss by Appellee

*11-14-85 Amicus Curiae *Middle South

(Brief attached)

*11-25-85 GRANTED By ABR 11/25/85

Response Filed City of N.O.

_____File Supp. Brief

_____Stay of Mandate

_____Recall of Mandate

_____Intervene

_____Intervene

_____File Reply Br. out of time *sub ABR 11-21

*11-14-85 * Expedite (appellant) Response Filed by City of

N.O. 11/21/85

*Sub ABR 11-22DATE:

*See: DEC. 9 11-25-85

* Handwritten Material

9. DOCKET ENTRIES Sub ABR 11-21-85

11/18/85 Flg. ltr. dtd. 11/18/85 from cnsl. for City of N.O. advising that they will file a response to motion to expedite.

11/20/85 Flg. ltr. dtd 11/18/85 from FERC advising they intend to file a brief as amicus by Friday, 11/22/85. Sub. ABR 11-21-85

11/22/85 Minute Entry: Judge Rubin ask that I phone cnsl. Andrew Carter and have him set up a conference call w/cnsl. for City of New Orleans after 2:30 p.m. today. (Joan Perkins)

11/25/85 Flg. Motion of FERC for leave to file brief in xerox, preliminary typewritten form. (GRANTED-jp-11/25/85)

11/25/85 Flg. order GRANTING appellant's motion to expedite appeal, but DENYING motion to set oral arg. for 12/2/85. The dist. ct.'s opinion was rendered 9/18/85 and motion was not fld. until 11/14, so the appellants have taken 54 days to file motion and briefs and the motion would allow the appellees less than 10 days within which to respond. The case is, however, set for oral arg. on the 9th day of January, 1986. Appellee's brief must be fld. by 12/16/85 at 5:00

10. JUDGMENT OR MANDATE INFORMATION

***2-28-86 Bill of Costs -*NOPSI**

_____Flg. & Entg. Judgment

_____Issg. Copy of Jdgt. to Bd & Cnsl.

_____Jdgt. as Mdt. Issd. to Clerk ***Hold Mandate**

_____Jdgt. as Mdt. Reissd. to Clerk ***Per J. Jones 3/4/86.**

_____Dismissal Issd. to Clerk_____

_____Record on Appeal Retd. to Clerk *** (Checked w/ J. *Jones on 3-29 Continue to hold) *Continue to hold Per.C.D.R.**

_____**Exhibits Retd. to Clerk**

_____ _____

_____ _____

*** Handwritten Material**

11. SUPREME COURT INFORMATION

_____Notice of Appeal to S.C.
_____Preparing Proceedings on Certiorari
_____Preparing Supp. Proceeding on Cert.
_____Transmitting Orig. Exhibits to S.C.
_____Order of S.C.—Ext. to_____
_____Notice of Fig. of Cert. Pet on_____
_____Order of S.C. ☐Denied ☐Granted_____
_____Notice of Denial of Pet. for Rehearing
_____Opinion of S.C. dated_____
_____Judgment of S.C.

85-3654

DATE	Filings-Proceedings
cont'd	
11/25/85	and hand delivered to one of opposing cnsl in N.O. by that time. Reply brief, if any, must be filed by 12/23/85, at 5:p.m., and hand delivered to one opposing cnsl. in N.O. by that time. (ABR)
12/6/85	Flg. motion of FERC for leave to participate in oral argument.* **Sub. AT 12/6/85**
12/9/85	Flg. response of NOPSI in support of FERC motion for leave to participate in oral arg. and further suggesting to the Court that it may wish to consider enlarging time to 30 minutes per side. * **-12-10 Hand carried to Judge Tate (illegible) to panel**
12/12/85	Minute entry: The Court, without issuing a formal order, GRANTED FERC's request to participate in oral arg. Also, the Court has increased the oral arg. time to 30 minutes per side. (AT) FERC's time will be deducted from allotted time of appellant.
12/16/85	Flg. Arkansas Public Service Comm's notice of intent to file a brief as amicus in support of appellees' position * **Sub. AT 12-17**
12/16/85	Flg. Miss. Public Service Comm. and Edwin Lloyd Pittman, Atty. Gen. for State of Miss.'s notice of intent to file amicus brief. * **Sub AT 12-17**
12/20/85	Flg. Motion of National Assoc. of State utility Consumer Advocates for leave to file amicus brief. (Brief attached). ***Sub. AT 12-23-85**
12/23/85	Flg. Arkansas's withdrawal of notice of intent to file a brief as amicus. (J)
12/23/85	Flg. order GRANTING motion of National Assoc. of State Utility for leave to file amicus brief in support of appellees. (AT)

* **Handwritten Material.**

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3654

NEW ORLEANS PUBLIC SERVICE, INC.,
Plaintiff-Appellant,

versus

THE CITY OF NEW ORLEANS,
THE COUNCIL FOR THE CITY OF
NEW ORLEANS, SIDNEY J. BARTHELEMY,
ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

O R D E R:

IT IS ORDERED that the motion of Federal Energy Regulatory Commission for leave to intervene to enable it to seek rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the Commission's request to extend the time up to and including October 16, 1986, within which to file a rehearing en banc, if allowed to intervene, is DENIED.

The mandate has already issued. The Federal Energy Regulatory Commission has had ample notice of these proceedings, including the fact that the Court was considering the action taken on September 2, 1986; has participated as amicus throughout these proceedings; and has filed briefs on the issues presented by the Court's action of September 2 which were considered by the Court.

/s/ CAROLYN DINEEN RANDALL

UNITED STATES CIRCUIT JUDGE

APPENDIX E

MINUTE ENTRY
McNAMARA, J.
September 16, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS PUBLIC SERVICE, INC.	*	CIVIL ACTION
VERSUS	*	No.85-3398
THE CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (2)

Before this court is the Motion of Defendants, the City of New Orleans ("City") and the Council of the City of New Orleans ("Council"), to Dismiss the complaint filed by New Orleans Public Service, Inc. ("NOPSI") pursuant to Fed. R. Civ. Proc. 12 (b)(1) and 12(b)(6). The Motion for Dismissal is predicated on the following grounds: (1) this court lacks subject matter jurisdiction (Fed. R. Civ. Proc. 12(b)(1)), because of the Johnson Act, 28 U.S.C. § 1342; (2) pursuant to the doctrines of Ripeness, Exhaustion of Administrative Remedies and Abstention, this court lacks jurisdiction or should refrain from exercising its jurisdiction; (3) the Council is immune from suit; and (4) Plaintiff fails to state a claim upon which relief can be granted.

At the outset, it is important to note that as Defendants have made a "factual attack" upon this court's subject matter jurisdiction, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Evans v. Tubbe,* 657 F.2d 661, 663 (5th Cir. 1981). Moreover, it is incumbent upon Plaintiff to prove that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980).

After consideration of the legal memoranda submitted by counsel, the applicable law, and the evidence proffered by the parties, the court finds that jurisdiction is precluded by the Johnson Act, 28 U.S. § 1342, and that the jurisprudential doctrine of abstention militates against judical review of those issues over which this court has or may have jurisdiction. It is therefore the finding of this court that this action be dismissed, for the reasons set forth below.

FACTUAL BACKGROUND

Pursuant to a permit granted by the City in 1922, Ordinance No. 7068 C.C.S., NOPSI provides electric service throughout the City (except Algiers). NOPSI also engages in the production, wholesale interstate purchase, wholesale interstate sale and retail sale of electric power. NOPSI, along with several other subsidiaries[1] owned by Middle South Utilities, Inc. ("MSU"), has entered into a series of power pool agreements ("System Agreement"). This System Agreement is a wholesale rate schedule, subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").[2] The System Operating Companies' agreement was submitted to FERC, and became effective on January 1, 1983. In June of 1982, a Unit Power Sales Agreement ("UPSA") was filed with FERC by Middle South Energy, INC. ("MSE"). MSE, also

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[1] The other subsidiaries are: Arkansas Power and Light Company ("AP&L"), Louisiana Power and Light Company ("LP&L"), and Mississippi Power and Light Company ("MP&L"). These utilities are the "System Operating Companies."

[2] FERC has authority to regulate the "sale of electric energy at wholesale in interstate commerce . . ." pursuant to §201(b) of the Federal Power Act, 16 U.S.C. § 824(b).

a wholly owned subsidiary of MSU, is the principal owner of the Grand Gulf nuclear generating facility near Port Gibson, Mississippi ("Grand Gulf"). Pursuant to UPSA, NOPSI is obligated to purchase a specific percentage of Grand Gulf power from MSE.

FERC issued an "Opinion and Order Setting Just, Reasonable, and Non-Discriminatory Rates ("Opinion No. 234") for Grand Gulf I on June 13, 1985. In accordance with FERC Opinion No. 234, NOPSI's allocation of costs, capacity and energy from Grand Gulf I is 17 percent. Accordingly, when Grand Gulf I began commercial operations on July 1, 1985, NOPSI was obligated to purchase 17 percent of Grand Gulf I power from MSE.

On May 17, 1985, NOPSI filed an application for a permanent rate increase in its retail electric rates with the Council seeking to allay costs associated with Grand Gulf and non-Grand Gulf related matters. On July 25, 1985, the Council entered a resolution directing NOPSI to resubmit its application for permanent rate relief since NOPSI had failed to comply with the filing requirements of the Council. The July 25th resolution also directed NOPSI to file a request for emergency interim rate relief. The Council subsequently issued Resolution R-85-526, specifically addressing NOPSI's request for emergency interim rate relief.

The action presently before the court was filed by NOPSI on August 2, 1985. In its complaint, NOPSI seeks declaratory and injunctive relief, as well as money damages against the City and the Council in reference to the Council's refusal to grant NOPSI the rate increase it has requested.

At a hearing on August 12, 1985, this court considered NOPSI's Motion for a preliminary injunction. The injunctive order would have compelled the Council to allow NOPSI to "pass through" its increase in interstate wholesale rates (arising from costs associated with Grand Gulf) onto its customers by increasing its intrastate retail rates. This court denied NOPSI's Motion without prejudice, and directed that the Council take action by September 5, 1985 on NOPSI's request for emergency interim rate relief which was to be filed by NOPSI on August 19, 1985 and to be considered at a public hearing scheduled for August 22, 1985. The court further noted that there were unresolved jurisdictional issues in this case that might foreclose adjudication on the merits. The resolution of these issues was deferred, pending Council action on NOPSI's request for interim rate relief.

On September 5, 1985, after public hearings, the Council issued a resolution, R-85-526, which granted in part NOPSI's August 19, 1985 request for emergency interim rate relief. In its resolution, the Council noted that NOPSI's *interim* rate increase proposal was devoid of any phase-in provision that would moderate the severe rate shock effect of the proposed substantial rate increase on its ratepayers. Accordingly, the Council emphasized that its emergency interim rate order would be based on an equitable balancing of the interests of NOPSI, its stockholders, and the ratepayers. The resolution ordered NOPSI to freeze electric rates until further regulatory action. This freeze would provide the utility with substantial fuel cost savings because of the lower fuel costs of Grand Gulf I compared to NOPSI's existing gas-fired generation. The Council further noted that NOPSI's immediate cash flow problems could be at least temporarily alleviated by

the following: the utility's issuance of $35 million dollars [sic] in securities pending the Securities and Exchange Commission's ("SEC") approval[3]; the repayment of $32 million dollars [sic] in cash advance made by NOPSI to MSE; and, the continued omission of NOPSI's dividend payments on common stock to MSU. Based on cash flow projections using these measures, the Council found that these measures would enable NOPSI to remain solvent until March 1986. See, R-85-526, pgs. 9 and 13.

Subsequent to the issuance of the resolution, NOPSI submitted formal requests for a clarification of the rate order. However, the Council construed such requests as seeking for more than clarification, as NOPSI's requests would substantively change the rate order. The Council proposed a public hearing to consider revising the rate order. NOPSI, however, has foregone that option and seeks injunctive relief from this court once again.

As noted earlier, at the hearing on August 12, 1985, this court expressed reservations about the "serious jurisdictional issues" inherent in this litigation. The court must now consider and resolve the following issues: (1) does the Johnson Act, 28 U.S.C. § 1342, preclude jurisdiction over the subject matter in the instant case, and (2) does the jurisprudential doctrine of abstention dictate that this court decline to exercise jurisdiction?

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[3] The Council noted that if the SEC denies NOPSI's application for the issuance of the securities, the utility should resubmit an application for emergency interim rate relief and this application would be considered on an expedited basis.

THE JOHNSON ACT

The Johnson Act, 28 U.S.C. §1342, provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

A cursory reading of the statute reveals that all four conditions must exist in order for the proscription to apply. *South Central Bell Telephone Co. v. Louisiana Public Service Comission*, 744 F.2d 1107, 1123, n. 28 (5th Cir. 1984).

The thrust of the Johnson Act ("Act") is to effect "a congressional hands-off policy relating to rate making . . ." *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974). While the provisions of the Act do not address declaratory relief or money damages, courts have found

that strong policy reasons dictate a broad reading of the Act so as to bring declaratory relief and money damages within the purview of the jurisdictional proscription. *See, Tennyson, supra,* at 1139. One strong policy reason dictating a broad reading is the "general rule [that] federal courts should not intervene in the state rate-making process unless the remedy in state court is inadequate." *Gulf Water Benefaction Co. v. Public Utility Commission,* 674 F.2d 462, 467 (5th Cir. 1982) (citing *Tennyson, supra,* at 1141). The Fifth Circuit has emphasized that "[t]he clear intent of this Act is to channel normal rate litigation into the state courts . . ." *Gulf, supra,* at 468.

With the foregoing principles in mind, this court must inquire as to whether all four criteria have been met so as to implicate the proscription of the Act.

In its supplemental brief on the inapplicability of the Act, NOPSI stated that "[t]wo of the Johnson Act conditions do not exist . . ." The two conditions cited were: (1) jurisdiction is *not* based solely on repugnance of the order to the Federal Constitution, and (2) the order *interferes* with interstate commerce. It is important to note that NOPSI *does not* contest the existence of the following two conditions: (1) the order was made after reasonable notice and hearing, and (2) a plain, speedy and efficient remedy may be had in state court. Accordingly, the court need only inquire as to whether the first two conditions of the Act have been met.

In reference to the Act's requirement that jurisdiction be based solely on diversity of citizenship or repugnance of the order to the Constitution, NOPSI contends that it cannot be met as the present action is based

in large part upon the Federal Doctrine of Preemption and 16 U.S.C. §825p of the Federal Power Act. 16 U.S.C. § 825p provides federal courts with jurisdiction to entertain actions "brought to enforce any liability or duty created by, or to enjoin any violation of" a FERC order. It is NOPSI's contention that the Council has violated a "duty" imposed upon it by FERC Opinion No. 234 and the Federal Power Act. The Defendants' contention is that while NOPSI has purportedly based part of its action on the Federal Power Act, the Council has, in fact, violated no provision of that Act. As noted, the Federal Power Act, 16 U.S.C. § 825p, provides federal courts with jurisdiction to entertain actions "brought to enforce any liability or duty created by, or to enjoin any violation of" a FERC order. NOPSI asserts that FERC Opinion No. 234 creates a *duty* on the part of the Council to "pass through" the costs NOPSI incurs as a result of its 17 percent FERC allocation to its retail ratepayers and, that the Council's failure to allow recovery of those expenses constitutes a violation of the FERC order. The court finds that a review of FERC Opinion No. 234 belies NOPSI's contentions, for the FERC order merely prescribes interstate wholesale rates that NOPSI is obligated to pay in exchange for its share of Grand Gulf power. More importantly, there is no mandate in the FERC order for state regulatory authorities to pass

through the expenses associated with NOPSI's interstate wholesale rates via an increase in intrastate rates. Indeed, such a provision is conspicuous by its absence.

Additionally, the court finds that the Council has not taken any definitive action on NOPSI's May 17, 1985 permanent rate increase application. In the September 5th resolution the Council states that its emergency interim rate order is without prejudice to NOPSI's application for a permanent rate increase, filed on May 17, 1985.

A review of the Council's actions and the FERC order at issue convinces the court that jurisdiction under the Federal Power Act is lacking for the Council has not breached any duty imposed by the FERC order nor have they violated any provision of that order.

NOPSI also asserted claims predicated on 28 U.S.C. § 1983, invoking this court's jurisdiction pursuant to 28 U.S.C. § 1343. The courts have been uniform in holding that the Civil Rights Statutes do not provide an avenue for circumventing the restrictions of the Johnson Act. *Kalinsky v. Long Island Lighting Company,* 484 F.Supp. 176 (E.D. N.Y. 1980). Similarly, NOPSI's jurisdictional invocation of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, does not provide for an independent basis of jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed.2d 876 (1950). Having considered the alleged jurisdictional bases asserted in NOPSI's complaint, the court finds that jurisdiction is based solely on repugnance of the Council's actions to the United States Constitution. Accordingly, the first condition of the Johnson Act has been met.

The second condition which must exist under the Act is that the rate order must not interfere with interstate commerce. In determining whether this condition exists, the courts inquire as to whether the rate order is "directly burdensome or otherwise discriminatory" of interstate traffic. *Kalinsky, supra,* at 176. The general rule is that "a rate issued by a proper state body does not interfere with interstate commerce [within the meaning of 28 U.S.C. § 1342(2)] unless it is directly burdensome or otherwise discriminatory." *Kalinsky, supra* (citations omitted). In *South Central Bell Telephone Co. v. Public Service Commission of Kentucky,* 420 F.Supp. 376, 378 (E.D. Ky. 1976), the court conceded that the phrase "interfere with interstate commerce" was nebulous. However, in construing the phrase, the court noted that the Act manifests congressional intent that state utility rates are matters for state regulations [sic]. Accordingly, the court found that state agency orders pertaining to intrastate telephone rates did not interfere with interstate commerce within the meaning of the Johnson Act. 420 F.Supp. at 378.

NOPSI contends that the Council's decision against an intrastate rate increase constitutes an impermissible burden on interstate commerce, as the utility will be rendered insolvent and the FERC order setting forth the allocation of Grand Gulf costs will ultimately be frustrated. More specifically, NOPSI aserts that the Council's refusal to implement rates taking into account the expenses associated with Grand Gulf will disrupt financial agreements among the members of MSU, threaten the operation of Grand Gulf I, and threaten the viability of an interstate intergrated electric system.

The Defendants emphasize the fact that the Council has not yet issued any order granting or denying NOPSI's

request for a permanent rate increase. Moreover, Defendants contend that any injunctive order issued at this point in time would be intrusive upon the Council's regulatory authority, for the Court would then be dictating the terms of an order which has yet to be formalized. A review of the evidence adduced supports the Defendants' contentions. As noted earlier, the Council's September 5th resolution was cognizant of the fact that no decision had been formalized in reference to NOPSI's request for permanent rate relief. More importantly, the September 5th resolution indicates that the Council is utilizing every feasible alternative to keep NOPSI in a positive cash position. NOPSI has argued that *Middle South Energy Inc. v. Arkansas Public Service Commission,* Nos. 84-2409, 2410 and 2480 (8th Cir. August 23, 1985) is apposite for resolving the issue of whether the Council's actions create an "interference on interstate commerce;" this court cannot agree. In *Middle South Energy,* the court was confronted with blatant attempts by the Arkansas Public Service Commission (APSC) to invalidate agreements relating to Grand Gulf. The APSC had ordered Arkansas Power and Light to appear and "show cause why all contracts and agreements made by it with respect to . . . the Grand Gulf project should not be held void *ab initio* as a matter of law." Slip op. at 7. NOPSI asserts that just as the Eighth Circuit found the APSC's attempted action had a discriminatory purpose and effect, this court must necessarily find that the Council's conduct is discriminatory in purpose and effect.

NOPSI concedes that the Council has not *directly* attempted to invalidate FERC Opinion No. 234, as did APSC in *Middle South Energy, supra.* Nonetheless, it claims that the Council's denial of sufficient emergency interim rate

increase manifests an attempt on the part of the Defendants to do indirectly that which they may not do directly. While NOPSI insists that its insolvency is imminent due to the Council's refusal to grant sufficient emergency interim rate relief, it bears repeating that the Council has not addressed the issue of NOPSI's request for a permanent rate increase. Moreover, the September 5th resolution reveals that the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives.

At this juncture, the court cannot and will not assume that when the Council does act on the issue of permanent rate relief, it will do so in a manner which conflicts with the FERC's order. Moreover, any rate orders or regulatory actions which *may* indirectly and incidentally affect interstate commerce, cannot suffice as an "interference" within the Johnson Act. *Kansas-Nebraska Natural Gas Co., Inc. v. City of St. Edward, Nebraska*, 234 F.2d 436 (8th Cir. 1956). Having sifted through the evidence, this court concludes that the Council's actions do not constitute an interference with interstate commerce. As all four criteria of the Johnson Act have been satisfied, this court is effectively precluded from issuing any injunctive, declaratory or monetary relief relative to the ratemaking functions and orders of the Council.

ABSTENTION AND OTHER CONSIDERATIONS OF COMITY

Even if this court were to find that the Johnson Act did not bar adjudication of Plaintiff's request for relief from the Council's regulatory authority, the jurisprudential doctrine of abstention and other considerations of

comity would dictate a similar result. Abstention embodies the well-established principle that under the rule of comity in cases dealing with state laws, rules or policy decisions, equitable considerations will require a federal court to stay its hand. *General Investment v. Service Corp. v. Wichita Water Co.,* 236 F.2d 464, 468 (10th Cir. 1956). Quite frequently, abstention is compelled on the grounds of comity with the states when the exercise of federal court jurisdiction would disrupt a state administrative process or conflict with a state's administration of its own affairs. *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

The hands-off policy in reference to state ratemaking, congressionally mandated in the Johnson Act, is evinced and manifest in *Burford* where the United States Supreme Court cautioned federal courts to keep a hands-off policy in state regulation of the oil industry.

In *Burford,* the court held that abstention was proper in a challenge to a Texas state commission's oil field proration order. The court emphasized that as there were "questions of regulation of the industry by the state administrative agency. . . [involving] basic problems of Texas policy . . . equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U.S. at 332-34, 63 S.Ct. at 1106-07. Moreover, the court noted that the state provided a unified method for the formation of policy and determination of cases by the commission and by the state courts.

Burford is a paradigm for abstention in the instant case. Without question, "the power to regulate intrastate services such as utilities has historically been reserved to

the states by Congress pursuant to the provisions of the Tenth Amendment of the United States Constitution." *Gulf Water Benefaction Co. v. Public Utility Commission*, 674 F.2d 462, 467 (5th Cir. 1982) (citations omitted). Undoubtedly, NOPSI's "pass through" proposal and its proposal for a permanent rate increase are matters which generate local concern and demand local administrative expertise. The court finds that the present case calls for *Burford* abstention as it is set in the context of "the quintessential *Burford* setting of a complex . . . regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review[4] are afforded. The usual rule of comity must govern . . ." *Aluminum Company of America v. Utilities Commission of State of North Carolina*, 713 F.2d 1024, 1029, *cert. denied*, ___ U.S. ___, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984).

NOPSI contends that abstention is inappropriate where the claim presented is based on federal preemption. NOPSI points out that in *South Central Bell Telephone Co., supra*, the Fifth Circuit rejected the application of *Burford* abstention in the context of a rate case based on a federal preemption claim. However, in *South Central*, the Federal Communications Commission ("FCC") had issued a Preemption Order *specifically* declaring that its depreciation rates and methodologies preempted inconsistent state law. Moreover, the FCC had issued a ruling prescribing the

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[4] Section 4-1604 of the 1954 Home Rule Charter, which governs the establishment of utility rates by the City Council, provides in part:

> Any party in interest may appeal from orders of the council to the Civil District Court for the Parish of Orleans by filing suit against the Council within thirty (30) days from the date of the order of the Council, and not thereafter.

specific rates to be used in calculating depreciation. The Louisiana Public Service Commission refused to implement the FCC's prescribed depreciation methods when South Central Bell requested a rate increase. 744 F.2d at 1112-1112 [sic]. The Fifth Circuit noted that South Central Bell's claim for a preliminary injunction was based on "a naked exercise of the federal preemption power." 744 F.2d at 1123. (citations omitted).

South Central Bell however bears no resemblance to the facts involved here. The case at bar is analogous to *Aluminum, supra,* where the Fourth Circuit noted that there is no *per se* rule against abstention in preemption cases; rather, the court must look at the facts of each case. In *Aluminum,* the Fourth Circuit found that the rate "order on its face set only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and [did] not directly conflict with FERC's wholesale and interstate rate setting powers." *Aluminum, supra,* at 1030. The court concluded that "[w]here circumstances are otherwise appropriate for *Burford* abstention, the federal court need not engage in [detailed] fact finding [concerning the indirect effects of the rate order on the rates and contracts filed with FERC] as a prerequisite to abstention." *Id.* In the instant case, the actions of the Council address only retail, intrastate rates, and such actions have not directly conflicted with FERC's order. As circumstances are otherwise appropriate for *Burford* abstention, this court need not engage in detailed fact finding concerning the preemption claim as a prerequisite to abstention.

In reference to Plaintiff's 28 U.S.C. § 1983 action against Defendants alleging a deprivation of civil rights,

there is no *per se* civil rights exception to the abstention doctrine. *C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 381 (9th Cir. 1983). Accordingly, as this court is "concerned with the much larger [policy] issue as to the appropriate relationship between federal and (municipal regulatory) authorities . . . ", considerations of delay, and inconvenience to the parties do not and cannot militate against abstention in this § 1983 action. 703 F.2d at 381.

Accordingly, the court finds that the Motion of the Defendants to Dismiss Plaintiff's action should be and is hereby GRANTED for lack of subject matter jurisdiction. As to those issues of which this court might take jurisdiction, principles of comity, require it to abstain.

* * * *

Supreme Court, U.S.
FILED
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No. 86-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Had this case not been rendered moot by a negotiated settlement, it would have presented the following question: Where an electric utility asserted a claim of federal preemption in seeking to enjoin an ongoing state regulatory proceeding that was needed to address complex issues of deep concern to the local community and had not yet ripened into an agency decision, could the federal court exercise discretion to abstain from adjudicating the preemption claim, recognizing that state courts were competent to provide swift review of issues arising under both federal and state law?

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IN THE

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No. 86-546

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v.

THE CITY OF NEW ORLEANS, *et al.*,
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BRIEF FOR THE CITY OF NEW ORLEANS, ET AL., IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 782 F.2d 1236. The amended opinion of the Court of Appeals is reported at 798 F.2d 858. The opinion of the District Court for the Eastern District of Louisiana is unpublished. Each of these opinions is reprinted in the appendix to the petition.

JURISDICTION

Before the Eastern District of Louisiana and the Fifth Circuit, NOPSI asserted claims based on the Commerce Clause, the Supremacy Clause, the "Preemption Doctrine," and the Federal Power Act, 16 U.S.C. § 791-828c (1982), and invoked federal jurisdiction under the Federal Power Act, 16 U.S.C. § 825p

(1982), and 42 U.S.C. § 1983 (1982). Before this Court, NOPSI asserts jurisdiction under 28 U.S.C. § 1254(1) (1982 & Supp. III 1985).

STATEMENT OF THE CASE

The City of New Orleans is a municipal corporation existing under the laws of the State of Louisiana and its Home Rule Charter. The Council of the City of New Orleans (the "Council") exercises all legislative powers of the City, and also is empowered under state law to regulate the rates and other activities of public utilities serving New Orleans.[1] Petitioner, New Orleans Public Service Inc. ("NOPSI"), is a member of the Middle South System[2] and is engaged in the retail sale of electricity to consumers in New Orleans.

This case arises from the efforts of the Council, in the exercise of its undisputed regulatory authority over NOPSI's retail rates, to address and, if possible, to mitigate the severe "rate shock" effect[3] to the New

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[1] The individually named respondents served as members of the Council at the time this action was instituted. The Council is on an equal plane with the Louisiana Public Service Commission in regulating public utilities, but the responsibility of each body is geographically different.

[2] Middle South Utilities, Inc. ("MSU") is an investor-owned public utility holding company, the wholly-owned operating subsidiaries of which include NOPSI, Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L") and Mississippi Power & Light Company ("MP&L"). Another wholly-owned subsidiary of MSU, Middle South Energy, Inc. ("MSE") (now System Energy Resources, Inc.), owns an undivided 90% interest in the nuclear power plant involved in this case, the remaining 10% of which is owned by non-Middle South interests.

[3] NOPSI sought an immediate rate increase of $168 million

Orleans community threatened by NOPSI's participation in the costly Grand Gulf nuclear project, located near Port Gibson, Mississippi. NOPSI brought this action in the District Court prematurely, before the Council had an opportunity to rule on the merits of the company's retail rate application. NOPSI now seeks review by this Court despite the fact that the issues raised by the complaint were rendered moot through a March, 1986 settlement between NOPSI and the Council. But for the settlement, the narrow issue presented would be whether the District Court, in the circumstances of this case, abused its discretion by invoking federal abstention to permit the local regulatory proceedings to be completed and the matter to be reviewed by the state courts.

The Grand Gulf project is, by any measure, a commercial failure. Grand Gulf Unit I originally was projected to cost approximately $600 million, and entered commercial operations in July 1985 at a cost in excess of $3.6 billion. Construction of a second Grand Gulf unit has been suspended, with approximately $1 billion spent and the unit likely to be cancelled. NOPSI became involved in the Grand Gulf project in 1974 when, without informing its local regulator, it entered into the first of a series of private agreements with

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annually, which would have resulted in an abrupt rate increase of approximately 50-60%. Evidence before the Council showed that such a dramatic increase in electric rates would have caused substantial hardship, loss of jobs, decline of business and increase of poverty in New Orleans, already one of the poorest cities in the country. The settlement ultimately adopted by NOPSI and the Council moderated the rate increase in a manner similar to that employed in similar circumstances by state regulatory authorities throughout the country, with annual increases limited to about 6% under a multi-year "phase-in" plan.

the other Middle South operating companies whereby they guaranteed indebtedness for the construction of the plant and agreed to purchase indeterminate portions of its output.[4]

In the early 1980's, agreements addressing the allocation of Grand Gulf I capacity, energy and expenses among the Middle South operating companies, as well as sales of power and energy by and between the operating companies generally, were filed with the Federal Energy Regulatory Commission ("FERC"), which has exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. After extensive proceedings, the FERC issued its Opinion Nos. 234 and 234A,[5] which adopted a formula to allocate the wholesale costs of Grand Gulf I among NOPSI and its much larger operating company affiliates, as follows: AP&L—36%; LP&L—14%; MP&L—33%; NOPSI—17%.

The FERC did not address the need to moderate the Grand Gulf rate increase at the local level through "phase-in" plans, nor did it determine the appropriate allocation of the increase among different classes of retail ratepayers ("rate design"). The FERC likewise

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[4] The Council first became cognizant of the potential impact of Grand Gulf on NOPSI and New Orleans in September 1980. At that time, NOPSI's chief executive officer assured the Council, under oath, that New Orleans would not have to pay for Grand Gulf should the Council deem it inappropriate, and that NOPSI would instead sell its power to other utilities.

[5] *Middle South Energy, Inc.*, 31 F.E.R.C.(CCH) ¶ 61,305 ((1985) (Opinion No. 234) and 32 F.E.R.C.(CCH) ¶ 61,425 (1985) (Opinion No. 234-A), *appeal docketed sub nom., Mississippi Industries v. FERC*, Nos. 85-1611 *et al.* (D.C. Cir. filed Sept. 26, 1985).

did not address the "prudence" of any entity's participation in Grand Gulf (either that of the wholesale seller, which incurred significant cost overruns, or that of the operating company purchasers, which might have taken steps to limit their exposure to Grand Gulf). In sum, the FERC did not, and did not purport to, preempt retail regulatory bodies from addressing issues bearing upon the manner, timing or magnitude of the retail rate increases required as a result of Grand Gulf.[6]

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[6] The FERC recognized the role of the States in the regulation of the Middle South operating companies:

> [W]e concurred in [Judge Head's] discussion of the need to balance Federal and State interests in exercising our jurisdiction. Furthermore, we think our opinion, taken as a whole, as well as Judge Head's discussion, which we adopted, clearly recognize the role of the States in regulating retail electric rates and the need to balance overlapping State and Federal electric rate jurisdiction.

32 FERC at 61,952.

On the issue of prudence, the then-Acting Chairman of FERC subsequently testified in a congressional hearing:

> The Commission did not determine the prudence of the purchase of power by the Middle South utilities from the Grand Gulf Nuclear Generating Station in Opinion Nos. 234 and 234-A.

See Prepared Testimony of the FERC Before Subcommittee on Energy, Conservation and Power, of the House of Representatives Committee on Energy and Commerce, Hearing on Prudence Reviews (March 14, 1986). Moreover, the FERC administrative law judge who heard the matter, confronted with the suggestion by Middle South attorneys that he should make some type of implicit prudence findings, repeatedly stated "I'm not getting into that," and indicated that he could not prevent the issue from being litigated in a state forum. F.E.R.C. Docket No. ER82-616-000, Tr. 228, 235-36, 248-51 (Mar. 14, 1983). The

On May 17, 1985, NOPSI filed an application with the Council seeking to recoup Grand Gulf costs through a formula-based increase in its retail rates. The application was filed a month before the FERC determined NOPSI's allocation of Grand Gulf costs and just two days after the Council reacquired regulatory authority over NOPSI (which had been vested in the Louisiana Public Service Commission for a period of four years). The Council promptly advised NOPSI of the need to conform its application for permanent rate relief to certain standard filing requirements, but also invited NOPSI to make an abbreviated request for interim rate relief and pledged expedited treatment.

Rather than requesting interim relief, NOPSI commenced this action on August 2, 1985, seeking preliminary and permanent injunctive relief and damages against the City, the Council and its members individually. After hearing live testimony on August 12, 1985, the District Court denied preliminary relief and directed NOPSI to seek interim rate relief from the Council.

Following expedited hearings on NOPSI's request, the Council, on September 5, 1985, granted interim relief which it found would strike an equitable balancing of the interests of NOPSI, its stockholders and ratepayers, and would permit NOPSI to meet its Grand Gulf obligations and remain solvent through

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District Court in this case found that a mandate for state regulatory authorities to immediately pass Grand Gulf-related expenses through to retail ratepayers was "conspicuous by its absence" from the FERC's opinion (Pet. at A-43), and another federal court contemporaneously reached a similar conclusion. *See* note 22, *infra*.

accelerated Council proceedings on the request for permanent rate relief. The Council (a) granted NOPSI $28.3 million of interim rate relief; (b) directed NOPSI to recover $32 million of excess advance payments made to MSE, part of approximately $67 million in total advance payments made by NOPSI; (c) reaffirmed a prior authorization for NOPSI to issue $35 million in new debt securities; (d) specified that NOPSI could recover, with interest, the amount of relief finally determined to be proper, for the period of the Council's deliberations; and (e) invited NOPSI to seek additional interim relief as necessary. NOPSI immediately requested certain changes in the interim rate order, but returned to the District Court before the Council could act on that request and again sought permanent injunctive relief mandating an unmoderated and immediate pass-through of all Grand Gulf costs.

The District Court dismissed the action on September 16, 1985, finding that the Johnson Act, 28 U.S.C. § 1342 (1982), deprived it of jurisdiction and that, in any event, it should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The court emphasized that the Council had not yet addressed the issue of NOPSI's request for a permanent rate increase, and found, based on the extensive evidence submitted, that the Council was acting responsibly and was "determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives." (Pet. at A-46).[7]

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[7] As matters developed, NOPSI did remain in a positive cash position, never sought additional interim relief from the Council,

On appeal by NOPSI, the Fifth Circuit initially reversed the District Court on February 14, 1986, holding that the Johnson Act did not defeat federal jurisdiction in this case and further holding (in a terse discussion) that the lower court erred in abstaining. On March 20, 1986, NOPSI and the Council entered into a comprehensive settlement of the permanent rate application that was the subject of this litigation, the terms of which were published in Council Resolution No. R-86-112. The settlement provides, *inter alia*, that NOPSI's shareholders will absorb $51.2 million of Grand Gulf I costs and that remaining costs (with interest) will be recovered from retail ratepayers under a phase-in plan designed to avoid the adverse effects of "rate shock."[8]

Although the settlement is subject to the resolution of certain other issues involving ongoing or potential litigation between the parties,[9] it does resolve the

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and was able to meet each monthly payment on its Grand Gulf obligation through and beyond the date of the March 1986 settlement.

[8] The settlement is similar in many respects to settlements entered into in other jurisdictions by AP&L, LP&L and MP&L, each of which agreed to moderate the retail rate impact of Grand Gulf and to absorb, in some fashion, a portion of the expenses allocated to it by the FERC. (In other parts of the country, local regulators and their jurisdictional utilities have struck similar compromises designed to deal with the effects of high cost nuclear plants.)

[9] Among the issues not resolved by the settlement was the prudence of NOPSI's conduct with respect to Grand Gulf, including the company's failure to sell off all, or some portion of, its Grand Gulf allocation in order to reduce its cost exposure. NOPSI's prudence is the subject of an ongoing Council investigation, which was instituted on October 10, 1985, *after* the

issues raised by the instant complaint and obviate the relief sought by NOPSI in this action. Indeed, in *NOPSI II* the company recently made the following admission with respect to the issues that were contested in this action and addressed by the settlement:

> First, plaintiffs do not contest the Council's regulatory jurisdiction over retail rates. Nor do they contest the Council's right to determine traditional ratemaking issues such as the cost of capital, rate-base, rate of return on rate-base, and allocation of rates among customer classes. Plaintiffs also do not contest the Council's right to determine whether the FERC-allocated Grand Gulf 1 costs can be offset in whole or in part by savings in other areas. Finally, plaintiffs do not contest the Council's right to work with NOPSI to determine how the Grand Gulf 1-related costs can best be phased-in. (*Indeed, all of these traditional retail rate issues have already been resolved*). (emphasis added)[10]

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instant action was dismissed. Neither the District Court nor the Fifth Circuit had occasion to consider the issue of prudence in this case. Instead, NOPSI and MSE filed a *second* federal complaint challenging the Council's authority to conduct a prudence investigation. Civil Action No. 85-5273, *Middle South Energy, Inc., et al. v. City of New Orleans, et al.* (E.D. La. filed November 14, 1985) ("*NOPSI II*"). *NOPSI II* currently is the subject of a motion to dismiss on the grounds of, *inter alia*, lack of ripeness, failure to exhaust administrative remedies, and abstention. Assuming dismissal of *NOPSI II*, NOPSI will still have an opportunity to seek judicial review of the Council's final decision on prudence, which is expected to be issued at or near the end of 1986.

[10] A copy of this NOPSI pleading has been lodged with the Court.

The Council, in turn, publicly has stated that its regulatory proceedings would not seek to invalidate any FERC-approved agreement relating to Grand Gulf I or order NOPSI to pay MSE a wholesale rate other than that determined by the FERC through its allocation.

The Fifth Circuit withheld issuance of the mandate following its February 14, 1986 opinion and, on June 10, 1986, advised the parties that it was contemplating revision of its treatment of abstention, requesting letter briefs on this issue. On September 2, 1986, the Fifth Circuit issued an order withdrawing Part IV of its earlier opinion and substituting a new Part IV, which concluded that "the district court's decision to abstain on the instant facts was a proper exercise of discretion." (Pet. at A-24.) The Fifth Circuit found that abstention was proper under both *Burford* and *Younger v. Harris*, 401 U.S. 37 (1971).[11]

REASONS FOR DENYING THE PETITION

I. THIS ACTION HAS BEEN RENDERED MOOT BY SETTLEMENT OF THE RETAIL RATE PROCEEDING

The issue NOPSI seeks to have this Court decide—whether the District Court erred in abstaining in the face of a claim of federal preemption—has been rendered moot by the March 1986 settlement of the retail rate proceeding before the Council. The essence of

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[11] The letter brief submitted by the City had informed the Fifth Circuit of the settlement, and the NOPSI letter brief specifically addressed the issue of mootness. The Court, however, did not discuss the settlement or address the issue of mootness, and simply revised the prior opinion issued in February.

NOPSI's preemption claim was that, in the wake of the FERC's allocation of Grand Gulf costs at the wholesale level, the Council had no lawful retail rate-making functions to perform and was obligated simply to implement a full and immediate pass-through of wholesale costs to retail customers. NOPSI's preemption claim did not survive the settlement, which addressed the very matters NOPSI had contended were beyond the Council's jurisdiction and, with NOPSI's concurrence, fashioned a comprehensive plan for recovery of Grand Gulf costs in retail rates. As NOPSI itself recently acknowledged in *NOPSI II*, "all of these traditional retail rate issues have already been resolved." Thus, review by this Court of the District Court's determination to abstain would serve no purpose and would not affect the rights of the parties.

This Court has held that it is the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atomic Workers v. Missouri*, 361 U.S. 363, 367 (1960), *citing Mills v. Green*, 159 U.S. 651, 653 (1895). Moreover, an actual controversy and an adversity of interests must exist "at all stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). Given the settlement between NOPSI and the Council, any decision by this Court on the abstention issue would be purely advisory and would not affect the rights of the parties.

NOPSI seeks to downplay the effect of the "partial settlement" (Pet. at 6 n. 7), arguing that the settle-

ment "did not contemplate or require that any litigation between the parties be dismissed" and that the Council reserved all its rights, including "alleged rights" (*id.*) to review NOPSI's prudence with respect to Grand Gulf and to abrogate certain NOPSI contracts respecting Grand Gulf.

On the first point, the fact that the settlement did not expressly require dismissal of this action is of no consequence because the settlement in fact disposed of the issues before the District Court. On the second point, the answer is that the rights reserved by the Council were not at issue before the District Court and, in fact, are at issue in separate pending litigation.[12] While NOPSI speculates that the outcome of other litigation may later affect the retail rates established pursuant to the settlement, this Court has held that "speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n. 5 (1974), *citing Hall v. Beals*, 396 U.S. 45, 49 (1969); *see also Local No. 8-6, Oil, Chem. & Atomic Workers, supra*, 361 U.S. at 370.

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[12] As noted earlier, the Council currently is conducting an investigation of NOPSI's prudence with respect to Grand Gulf. NOPSI challenged the Council's right to conduct such an investigation through a second complaint filed before the Eastern District of Louisiana in *NOPSI II*, but has since amended its complaint so as to limit its objection to the type of remedy the Council could order if it found imprudence. In filing the second complaint, NOPSI specifically alleged that it raised an issue—prudence—not foreclosed by dismissal of the instant action. The other reserved right of the Council alluded to by NOPSI, involving potential abrogation of certain NOPSI contracts, is the subject of litigation pending before a Louisiana court and was not before the District Court in this matter.

For these reasons, this case is moot and the NOPSI petition should, accordingly, be denied.[13]

II. THE FIFTH CIRCUIT'S DECISION TO ABSTAIN WAS PROPER AND CREATES NO CONFLICT AMONG THE CIRCUIT COURTS

The abstention doctrine is based on notions of comity and on the long-standing policy that the federal courts should not ordinarily interfere with state judicial and administrative proceedings.[14] This Court has

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[13] The Court has stated that its normal practice in dealing with a civil case from a federal court that has become moot is to vacate the judgment below and remand with directions to dismiss. *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950). However, respondents urge the Court in this case to follow the course advocated by the government (and perhaps taken by this Court) in *Velsicol Chem. Corp. v. United States*, 435 U.S. 942 (1978), which suggests that in situations where the Court would have denied the petition on the merits (see discussion, *infra*, pp.13-26), it should deny the petition notwithstanding a suggestion of mootness. *Cf. Local 102, International Ladies' Garment Workers' Union v. United States*, 439 U.S. 1070 (1979). Denial of the petition is particularly appropriate here, where mootness results not from events beyond the control of the petitioning party but from a settlement voluntarily entered into by both parties. *Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters*, 686 F.2d 720 (9th Cir. 1982). Alternatively, the Court should deny the NOPSI petition regardless of whether, but for mootness, it would have granted certiorari, because NOPSI had a "full and fair opportunity to litigate" the abstention issue before the District Court and the Fifth Circuit, and has no entitlement to further review by the Supreme Court. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946 (1980).

[14] In *Younger v. Harris*, 401 U.S. 36, 44 (1971), this Court referred to these basic principles as "Our Federalism" and noted that the concept represents "a system in which there is sensi-

defined three general categories of abstention, two of which were relied upon by the Fifth Circuit in this case.[15]

The principal thrust of NOPSI's petition is that the Fifth Circuit's decision to abstain on the facts of this case was erroneous and creates a direct conflict with decisions of other circuit courts. With unabashed hyperbole, NOPSI asserts that this abstention issue "may become the major legal battleground in utility regulatory matters during the latter half of the 20th century." (Pet. at 8, footnote omitted).

In truth, the Fifth Circuit's decision to abstain properly focused on the circumstances of this case, which arose under a statutory scheme that explicitly preserves the authority of local regulators over retail electric rates, and involved a local regulator that had not yet had an opportunity to issue a final decision. The court recognized "that abstention in the face of a federal preemption claim is, at a minimum, prob-

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tivity to the legitimate interests of both State and National Governments . . . ." *See also, Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[15] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford* abstention"), *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger* abstention"), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) ("*Pullman* abstention"). The Fifth Circuit relied on *Burford* and *Younger*, but *Pullman* also supported dismissal of the complaint in this case because, but for the settlement, state court review of issues of state law addressed in a final Council decision on NOPSI's rate application might well have eliminated the need to decide NOPSI's claims based on the Supremacy and Commerce Clauses of the Federal Constitution. If the Fifth Circuit's decision to abstain is supportable on any basis, it should be upheld. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

lematical," and expressly declined to intimate "that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion . . . ." (Pet. at A-15, A-17). While other circuits have declined to abstain when confronted with a preemption claim in other circumstances, those cases either have not involved the strong tradition of state control over retail rates preserved by the Federal Power Act or have involved state action directly in conflict with a federal statute.[16] Even circuit courts that have declined to abstain have simultaneously declined to establish a *per se* rule against abstention in the context of a preemption claim.[17]

In short, there exists no hard-and-fast rule for or against abstention in the face of a federal preemption claim, and the lower courts are proceeding on a case-by-case basis to strike a reasonable balance between the interest of federal plaintiffs in a federal forum and the need for deference to the state judicial and administrative process. Plenary review is not warranted here, particularly in view of the guidance recently provided by this Court on the issue of abstention, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986), and on the underlying issue of preemption, *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

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[16] See pp. 21-24, *infra*.

[17] *See, e.g., Baggett v. Dept. of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111, 1117 (3d Cir. 1986).

A. *Burford* Abstention Was Proper on the Facts of This Case

Burford abstention is appropriate where there exists a comprehensive state regulatory system and where federal interference would disrupt efforts to develop a reasoned response to a matter of legitimate local concern. In finding *Burford* abstention proper in this case, the Fifth Circuit properly accorded significance to the "bright line" that exists between federal and state jurisdiction under the Federal Power Act, denying "state power to regulate a sale 'at wholesale to local distributing companies' and allow[ing] state regulation of the sale at 'local retail rates to ultimate consumers.' "[18] While NOPSI's arguments focused on the potential for disruption of a federal scheme, the Fifth Circuit correctly found that federal court intervention in this case might well "constitute a disruption of a *state* regulatory scheme, for *retail* ratemaking is clearly a field left to the jurisdiction of the states."[19]

With this dual system of state and federal regulation in mind, the Fifth Circuit correctly found that the precepts for *Burford* abstention were satisfied in this case. Pet. at A-19, A-20. First, the regulation of retail rates is a matter of substantial local concern

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[18] *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 214 (1964), *quoting Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 504 (1942).

[19] Pet. at A-16. (emphasis in original). Resolution of the abstention issue presented by this case did not require a determination of the precise limits of the Council's authority to determine retail rates following the FERC's allocation of wholesale costs, for the Council had not yet had an opportunity to rule on the merits of NOPSI's rate application. As the Fifth

and requires local administrative expertise. In the extreme and unusual circumstances of this case, the Council had a legitimate interest in addressing—indeed, a responsibility to address—the threat of "rate shock" to the entire New Orleans economy and population.[20]

Second, the Fifth Circuit also correctly concluded that the Louisiana state courts were fully competent to resolve NOPSI's claims based on actions taken by the Council.[21] The local administrative process provided NOPSI with the right to support its position through testimony and evidence, and further provided

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Circuit stated: "Concerns of federalism lead us to treat challenges to anticipated state action 'with special skepticism.' " Pet. at A-24, *quoting* 17 Wright, Miller & Cooper, Federal Practice and Procedure § 3532.6 (Supp. 1986). Thus, this case, as it confronted the District Court, did not require resolution of issues such as those this Court decided in *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

[20] Evidence developed in the Council proceedings showed that the immediate, unmitigated pass-through of Grand Gulf costs would result in the loss of over 6,000 jobs, make it impossible for over 1,100 otherwise qualified families to qualify for mortgage loans, push the income of 1,760 families below the poverty line, reduce state and local tax revenues by over $30 million annually, and otherwise have a profound adverse effect on local manufacturing and service businesses.

[21] *See Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 349-50 (1951), in which this Court found that an injunction should not be granted if there is "adequate state court review of an administrative order based upon predominately local factors . . . ." While the Fifth Circuit focused on the competence of Louisiana courts to address federal claims, and seemed to suggest that no issues of state law were involved, a final Council decision on NOPSI's application almost certainly would have involved novel issues of state utility law.

for direct appeal of the Council's ruling to the Civil District Court for the Parish of Orleans.[22] The result of abstention is not the absence of federal judicial review. Instead, the abstention doctrine requires that a matter be referred first to the local regulator and the local courts for development, review and rectification, with ultimate review, if needed, by this Court.[23]

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[22] The path followed in contemporaneous circumstances by LP&L, NOPSI's sister company, illustrates the proper course of litigation. First, LP&L sought federal injunctive relief to require the Louisiana Public Service Commission ("LPSC") to immediately pass through its Grand Gulf costs. The district court dismissed this action on the basis of the Johnson Act. *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp 445 (M.D. La. 1985). LP&L then commenced a similar action in state court. The state court initially remanded the case to the LPSC for expedited consideration. *Louisiana Power & Light Co. v. Louisiana Public Service Commission*, No. 292,026, Slip Op. at 3 (19th Dist. La., Aug. 29, 1985). When the LPSC flatly refused to recognize the Grand Gulf costs, the state court swiftly found that the LPSC was acting arbitrarily and capriciously and imposed an immediate remedy. *Louisiana Power & Light Co. v. Louisiana Public Service Commission*, No. 292,026 (19th Dist. La., Oct. 9, 1985).

[23] *See, e.g., Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986). *See also Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857, 860 (10th Cir. 1985) ("If adequate state court review of an administrative order based upon predominantly local factors is available, intervention of a federal court is not necessary for the protection of federal rights."); *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77, 80 (4th Cir. 1985) (ongoing state administrative proceedings were found to provide "the opportunity for adequate and fair administrative review."); and *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 242 (3rd Cir. 1972), *cert. denied*, 410 U.S. 943 (1973) (federal courts should refuse to intervene when adequate state judicial review is available.)

B. *Younger* Abstention Was Proper On The Facts Of This Case.

The Fifth Circuit properly concluded that abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971), which holds that abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal claims can be raised and preserved in ongoing state judicial proceedings that concern important state interests.[24] The facts of this case satisfied each element of the three-prong test for *Younger* abstention, as recently set forth in *Ohio Civil Rights* and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Pet. at A-23, A-24.

First, the Fifth Circuit properly found, consistent with this Court's decisions in *Middlesex*[25] and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986),[26] that an administrative

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[24] Although *Younger* originally was limited to pending state criminal proceedings, this Court's decision in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), makes clear that the doctrine is applicable to non-criminal proceedings "when important state interests are involved." *See also, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986).

[25] In *Middlesex*, this Court found that state bar disciplinary proceedings before a "District Ethics Committee" were judicial proceedings within the meaning of *Younger*. 457 U.S. at 432-433.

[26] In *Ohio Civil Rights*, this Court held that an administrative proceeding before the Ohio Civil Rights Commission to determine whether a school was guilty of employment discrimination was a judicial proceeding. 106 S.Ct. at 2723.

proceeding before the Council is judicial because it is appealable to a state court.[27]

Second, for reasons already discussed, the Council's ongoing administrative proceeding clearly involved an "important state interest" in determining the retail rate treatment of Grand Gulf costs. NOPSI now claims that it did not seek to enjoin the Council's right to set retail rates, but NOPSI's request for a full and immediate pass-through of Grand Gulf charges—before any final ruling by the Council—clearly conflicted with the Council's right and obligation to consider such local regulatory issues as rate shock, rate design and phase-in.

Finally, but for the intervening settlement, NOPSI would have had ample opportunity to present its federal claims to the Louisiana Civil District Court following Council action on its rate application. As the Fifth Circuit observed, NOPSI cited "no authority indicating that state review cannot be had of its claims."[28]

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[27] Pet. at A-23. *See United Services Automobile Association v. Muir*, 792 F.2d 356, 365 (3rd Cir. 1986) (a state administrative proceeding is part of its judicial proceeding, for *Younger* purposes, if it provides an adequate opportunity to raise constitutional challenges); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3rd Cir. 1981) (where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, abstention is proper under *Younger*). *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984) (*Younger* abstention not appropriate where under the terms of the Hawaii Land Reform Act of 1967, administrative proceedings are not part of, and are not themselves, a judicial proceeding).

[28] NOPSI also argues that abstention typically is not invoked

C. There Is No Per Se Rule Barring Abstention In The Face Of Preemption Claims, And The Circuit Courts Properly Have Addressed The Issue Of Abstention On A Case-By-Case Basis.

In determining that this was an appropriate case for abstention, the Fifth Circuit was fully aware that the circuit courts have not developed a uniform policy either requiring or prohibiting abstention whenever a claim of federal preemption is asserted. Instead, the courts have applied settled abstention jurisprudence to the facts of each case, with particular attention to

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unless the state is the plaintiff in a state court action. As the Fifth Circuit noted, however, this view has been "vigorously criticized." Pet. at A-22 n. 2, *quoting* 17 Wright, Miller & Cooper, Federal Practice and Procedure § 4254 at 216 (Supp. 1986). *See also American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. Mar. 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49). NOPSI further argues that two exceptions to the *Younger* doctrine—bias of the agency and irreparable harm to the federal plaintiff—are applicable in this case. However, the Fifth Circuit found that there was no "bad faith, harrassment [sic] or other exceptional circumstances" sufficient to preclude *Younger* abstention. (Pet. at. A-24). Unlike the situation in *Gibson v. Berryhill*, 411 U.S. 564 (1973), which involved hearings before an administrative board, the members of which had a substantial and personal pecuniary interest in the outcome, there was no suggestion here that the Council or its individual members had any pecuniary interest in the disposition of NOPSI's rate application. Moreover, NOPSI's assertion that the Council is pursuing a plan to take over the company's electric utility business was the subject of a separate federal court action dismissed for lack of ripeness. *Middle South Energy, Inc., et al. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986). Finally, this case involved no threat of irreparable injury sufficient to evade *Younger*, and the cases cited by NOPSI on this point (Pet. at 17 n. 20) either involved no abstention issue or were decided before both *Younger* and *Burford*.

the status of the state proceeding and the extent to which it has conflicted with, or is likely to conflict with, the federal scheme. The flexibility and effectiveness of the lower courts in addressing this issue, and the absence of any need for further guidance from this Court, are illustrated by examining not just the results reached by different circuits but also the different results reached by *particular* circuits in differing factual and legal contexts.

For example, in a different factual setting, the Fifth Circuit itself has refused to abstain from intervening in ongoing state administrative proceedings. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *vacated and remanded on other grounds*, 106 S.Ct. 2884 (1986), the Fifth Circuit found that regulatory action by the Louisiana Commission was "directly contrary" to an order issued by the Federal Communications Commission and that the case was "in no way dependent on local factors or local expertise for [its] resolution." 744 F.2d at 1123. Under these circumstances, abstention was held to be improper.

Similarly, the Fourth Circuit has reached different conclusions, in differing contexts, regarding the propriety of abstaining in the face of a preemption claim. In *Aluminum Co. of America v. Utilities Comm'n of State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the court abstained under *Burford* from reviewing a state commission rate order involving "important and basic considerations of state policy" (*id.* at 1029), but noted that a refusal to abstain would be required where the "challenged state action clearly conflicts with preemptive federal law." *Id.* at 1030. Subsequently, the Fourth Circuit

upheld a lower court's refusal to abstain where the state commission, in reliance upon a West Virginia statute, created a "direct, facial conflict" with federal law by asserting authority to disapprove an interstate transmission agreement previously approved by the FERC. *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F.Supp. 64 (S.D.W.Va. 1985), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D.W.Va. 1986).[29]

Other cases relied upon by NOPSI in an effort to show dissension among the circuits do not involve a statutory regime, such as the Federal Power Act, which carefully preserves the role of state regulation, and these cases establish no *per se* rule for or against abstention.[30]

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[29] Other cases that involved the Federal Power Act or the Natural Gas Act and in which the court refused to abstain likewise involved a direct, facial conflict. *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Commission*, 791 F.2d 1111 (3rd Cir. 1986), (outright denial by Pennsylvania Commission of a utility's request to recover costs it incurred pursuant to FERC-approved tariffs); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986) (direct attempt by APSC to declare FERC-approved agreements void *ab initio*). NOPSI's contention (Pet. at 8) that *Middle South Energy* involved the "identical abstention issue" presented in this case is specious.

[30] *Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984) (no *Younger* abstention because several federal plaintiffs were not parties to state court action in which constitutional challenges would be resolved); *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521 (11th Cir. 1983) (no *Younger* abstention where involved tug boat pilotage subject to exclusive federal jurisdiction); *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206 (9th Cir. 1980) (*Burford*

Finally, the Sixth Circuit's decision in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. March 24, 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49), represents a proper exercise of federal court discretion to invoke *Younger* abstention where an important state interest was involved and the claim of federal preemption could be raised in an ongoing state judicial proceeding. Even *American Electric* bears important factual distinctions from this case, however, since the state commission there had rendered a final decision and the relief sought did not, in the view of the court's majority, implicate questions of state law (regarded by the majority as necessary for *Burford* abstention). Here, the Council had not had an opportunity to rule on the merits of federal *or* state law issues raised by NOPSI's retail application.

III. THE JUDGMENT BELOW ALSO IS SUPPORTABLE ON GROUNDS OF LACK OF RIPENESS AND FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

There exist two alternative grounds upon which dismissal of NOPSI's complaint could properly have been based: lack of ripeness and failure to exhaust administrative remedies. Although these grounds were not relied upon (or, for that matter, directly considered) by the District Court or the Fifth Circuit, they were

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abstention inappropriate for preemption claim based on Labor Management Relations Act, though *Pullman* abstention deemed appropriate); *see also California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969) (federal courts should not intervene where federal preemption claims may be raised in pending state administrative proceedings).

argued by respondents at all stages of the litigation and provide independent support for the judgment of dismissal.

The ripeness doctrine is intended to prevent the federal courts "from entangling themselves in abstract disagreement over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Garner*, 387 U.S. 136, 148-149 (1967). *See also Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972). The claims asserted by NOPSI in this case clearly were premature because they were presented before the Council had ruled upon the merits of NOPSI's retail rate application. At this early stage, it was impossible to determine whether the Council's actions would actually be in conflict with the FERC's allocation of Grand Gulf expenses at the wholesale level.[31] Moreover, NOPSI did not face "hardship" sufficient under *Abbott* to warrant judicial relief in advance of the Council's determination on the merits, since the Council had afforded interim relief and, as the District Court found (Pet. at. A-45), was "utilizing every feasible alternative to keep NOPSI in a cash positive position."[32]

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[31] *See Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), in which this Court held that a preemption challenge to a state commission charged with responsibility for determining the adequacy of a nuclear plant's storage capacity was not ripe for review since the state commission had not yet found the plant's capacity to be inadequate.

[32] This Court's recent decision in *Ohio Civil Rights* does not

The doctrine of exhaustion of administrative remedies provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This prohibition applies with equal force to state administrative proceedings. *See Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952); *Illinois Commerce Commission v. Thomson*, 318 U.S. 675 (1943); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937). In this case, NOPSI improperly sought judicial intervention without first attempting to exhaust its administrative remedies before the Council and, indeed, obstructed the administrative process by depleting the Council's limited resources through an expedited motions practice in federal court. Such disruption of the administrative process is precisely what the exhaustion requirement is designed to avoid, and the wisdom of requiring that administrative remedies be pursued is underscored by the fact that the Council proceedings culminated in a settlement of the issues raised by NOPSI's federal complaint.

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support a finding of ripeness here. There the Court, relying on *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), held that the actual filing of an administrative action threatening sanctions in breach of rights protected by the First Amendment presented a ripe controversy, just as threatened criminal prosecutions in violation of constitutional rights presented ripe controversies in *Steffel* and *Doran*. Here, even if NOPSI's preemption claim were regarded as constitutional (contrary to petitioner's position), it did not implicate personal constitutional rights and, as a practical matter, could not have been adjudicated before the scope of the Council's final decision was known.

IV. THE JOHNSON ACT DEPRIVED THE DISTRICT COURT OF JURISDICTION

The Court should deny the petition because this case has become moot, because the District Court properly abstained, and because NOPSI's claims were, in any event, premature. Should the Court grant the petition, however, it would be appropriate to consider whether the Fifth Circuit erred in overruling the District Court's determination that the Johnson Act, 28 U.S.C. § 1342 (1982), barred the exercise of federal jurisdiction in the circumstances of this case. In its first opinion, the Fifth Circuit held that the Johnson Act did not bar jurisdiction because its first criterion—that jurisdiction be based solely on repugnance of the state commission's rate order to the Federal Constitution—had not been satisfied. This holding was not altered by the second opinion, which affirmed the District Court on the issue of abstention.

With due respect, the Fifth Circuit erred when it held that a claim of federal preemption, which ultimately is grounded in the Supremacy Clause, should be treated as a statutory claim rather than a constitutional claim for Johnson Act purposes. Although the court characterized NOPSI's preemption claim as "statutorily-based" (as did NOPSI), at no point did it identify a federal right of action available to NOPSI under any provision of the Federal Power Act.[33] This

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[33] The Fifth Circuit did not decide whether jurisdiction existed under 16 U.S.C. § 825p, which grants jurisdiction to the federal courts to enforce duties created by the Federal Power Act or by orders of the FERC. (Pet. at A-5). The District Court held that § 825p did not support federal jurisdiction because no "duty" was imposed on the Council by either the Act or the FERC's Opinion No. 234. (Pet. at A-42.) A similar result was reached

Court has on occasion characterized preemption claims as statutory where such treatment served a valid policy objective, *Swift & Co. v. Wickham*, 382 U.S. 111 (1965) (claimed invalidity of state statute under Supremacy Clause due to conflict with federal statute deemed not to involve a constitutional challenge requiring three-judge court under 28 U.S.C. § 2281 (repealed 1976)), but treating preemption claims as statutory for purposes of the Johnson Act would effectively nullify that provision's important limitation on federal jurisdiction, especially in view of the prevalence of preemption claims today. While respondents do not believe that this case is a proper vehicle for Supreme Court review of *any* issue raised by the petition, should certiorari be granted the Johnson Act issue could properly be considered and would provide an independent ground for sustaining the judgment below.[34]

CONCLUSION

For all of these reasons the petition should be denied.

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in *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp. 445 (M.D. La. 1985).

[34] The Johnson Act issue is properly raised in this brief in opposition because a cross-petition is not necessary for the prevailing party to defend its judgment on any ground properly raised below, so long as it would not change the judgment. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

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AMICUS

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(3)

Supreme Court, U.S.
FILED
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No. 86-546

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 6, 1986, the Court invited the Solicitor General to file a brief expressing the views of the United States in *American Electric Power Co.* v. *Kentucky Public Service Commission,* No. 86-49. That case presents the question whether, when a public utility brings a suit in federal court against a state public service commission, claiming that the state commission's ratemaking determination violates the "filed rate doctrine" under which a state commission is bound to honor the interstate wholesale rates filed with or fixed by the Federal Energy Regulatory Commission (see *Nantahala Power & Light Co.* v. *Thornburg,* No. 85-568 (June 17, 1986) slip op. 8), it is inappropriate for the federal court to abstain from adjudicating the federal claim.

On October 3, 1986, petitioners in the present case filed a petition for a writ of certiorari that raises a similar question in a somewhat different procedural posture. In our response to the Court's invitation in No. 86-49, which we expect to file promptly, we will offer the Court our views

on whether the question presented in these cases merits the Court's attention at this time and, if so, which, if either, of the two cases presents the question in an appropriate posture for this Court's review. We therefore suggest that the Court postpone its disposition of the petition in No. 86-546 until we have had an opportunity to express the views of the United States in No. 86-49.

It is therefore respectfully submitted that the petition for a writ of certiorari should be considered together with the petition for a writ of certiorari in *American Electric Power Co.* v. *Kentucky Public Service Commission,* No. 86-49.

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Solicitor General

NOVEMBER 1986

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

This brief is filed pursuant to Rule 22.6 in response to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 86-49 ("the Government Brief"). The Government Brief[1] addresses review here and was served upon the parties to this action.

STATEMENT

The Government urges this Court to review a case that was prematurely and improvidently commenced, has been settled in substance, represents no conflict and is consistent with established law. After the FERC allocated Grand Gulf I costs to NOPSI as a wholesale rate, the Council confronted complex retail ratemaking issues—within its *exclusive* jurisdiction. The Government omits mention of any such issues. For example, in order to address the "severe rate shock effect" (Pet. at A-38.) portended by a 60 percent rate increase, the Council was entitled to consider rate "phase in" (or "levelization"), that graduates the increase over time to alleviate its impact.

The FERC's own administrative law judge declared that levelization had to be decided by local regulators: "The design of local retail rates to ultimate consumers is a matter within the jurisdiction of the states. . . . in light of the clear bright line which the Federal Power Act sought to draw between Federal and state jurisdiction over electric

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[1] References to the parties and other participants here are in the same form as in the respondent's principal brief. The Solicitor General and the FERC are, together, referred to as "the Government"; and their brief as ("G.Br."). References to respondents' principal brief are in the form ("CNO Br.").

utilities. *F.P.C. v. Southern California Edison, Co.*, 376 U.S. at 215-16." *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 at 65,148. NOPSI's lawsuit, which sought a mandatory, immediate and full pass-through, was entirely inappropriate.[2]

A. The Federal Power Act

The Government's presentation of the Federal Power Act omits any reference to the reservation of regulatory powers to the states. Section 201 of the Act, 16 U.S.C. § 824(a) concludes, "such Federal regulation, however, to extend only to those matters not subject to regulation by the States." The Act denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

In *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964), the Court concluded that Congress had "apportioned regulatory power between state and federal governments." *Id.* at 211 and adopted the *Attleboro* "bright line" that preserved the states' traditional role in setting local retail rates. *Id.* at 214-15.

The Government's refusal to acknowledge this limit is paralleled in its treatment of the "filed rate doctrine." Its impact on state retail regulatory powers was recently explicated in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986). *Nantahala* bears on abstention by

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[2] The local regulator must also consider how customer classes (industrial, commercial and residential) should bear the increase and can inquire into public interest issues that may suggest the desirability of cost absorption by a utility. It is not invariably in a utility's interest to pass on costs fully, which might initiate the "death spiral" effect of "rate shock." That is, business and low-income residents, leave or go bankrupt. Unpaid costs are then borne by a diminished customer base. This triggers a new round of failures, leaving the utility in a financially untenable position.

illustrating how a claim of preemption involving the filed rate doctrine may properly be dealt with. The decision was rendered on appeal from the North Carolina Supreme Court. Regulatory issues had been allowed to develop within the state system, for ultimate review by this Court.

There, the FERC had adopted a formula for allocation of costs between utilities located in different states. The state simply adopted a different formula as the basis for retail rates. The Court held that the "filed rate doctrine" barred adoption of a contradictory formula and required the state to pass through costs in order to avoid their "trapping." 106 S. Ct. at 2359. The Court held, however, that traditional retail ratemaking actions (*e.g.*, recognition of offsetting costs) could properly be taken. *Id.* at 2357-58.[3]

B. Proceedings Before the Counsel

The Government (pp. 10-15, 27) would portray NOPSI as having suffered unjustified administrative delay.Although the matter before the Council required factual and expert presentations, it could have been conducted more expeditiously, but for NOPSI's strategy. Even so, the time was a fraction of what the FERC took in the Grand Gulf I matter and other typical FERC and judicial, proceedings require. The Fifth Circuit found that there was no "bad faith, harassment or other exceptional circumstances," and indicated a different result if there had been. (Pet. at A-24.) The Government also omits to state that NOPSI sought a billion dollars in damages from members of the Council personally, apparently for intimidation. (Compl., par. 33.) Instead of participating responsibly, NOPSI bypassed opportunities for relief and sought to exhaust the Council's resources through litigation. (See Pet. at A-39.)

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[3] *See* note 2 *supra*. Moreover, although the prudence inquiry is not before the Court in this case, it should be noted that the *Nantahala* case did not involve managemental imprudence. See discussion *infra*.

NOPSI filed its application to increase retail rates just two days after the Council reacquired regulatory authority from the state commission. While the Council required time to institute orderly procedures, it acted responsibly throughout. For example, on July 17, 1985, after public hearing and technical review, the Council authorized NOPSI to issue $60,000,000 in securities. (R. Def. Ex. P.) The Council, on its own initiative, set a hearing on interim rate relief, Resolution R-85-423, and later provided relief.

During the proceedings NOPSI sought delays in setting of filing requirements, delayed submission of information, ignored invitations to seek interim relief, and testified, in the face of expert evidence, that it would become insolvent in September, 1985. It claimed inability to recapture the $32 million "advance payment" it had made (based on the improper allocation that the FERC had rejected), though, at the Council's instance, it did so. The Council enabled NOPSI to remain current on its Grand Gulf I payments throughout.

DISCUSSION

A. The case was correctly decided below.

The Government concedes the availability of abstention and that there is no *per se* rule against abstention in a federal preemption case (G.Br. 10, 22, n. 13); and that abstention depends upon "the particular preemption claim at issue." (*Id.*) It contends, however, that there can be no abstention if there is a "preemption claim based on the filed rate doctrine" (*id.*), arguing for special treatment of FERC decisions.

Both courts below found a compelling need for *Burford* abstention here. The Fifth Circuit stated that, "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able

to address NOPSI's complaints about Council actions. . . ." (Pet. at A-19.)[4] Yet the Government contends that there were "no state law or policy concerns" present here. (G.Br. at 17.) Moreover, it denigrates abstention where the proceeding is before a state administrative body (G.Br. 14-20, especially n. 11). The law is to the contrary. *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 349 (1951), *See also Robert-Gay Energy Enterprises Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77 (4th Cir. 1985); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). The Council's authority is on equal plane with LPSC; in fact, NOPSI derives its authority to operate from the Council.[5]

The three part test of *Younger* was also met here.[6,7] This Court's recent decision in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), is virtually dispositive. The Court of Appeals held that a state administrative proceeding—which involved selection criteria for teachers, "intrusive" actions and con-

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[4] The Fifth Circuit could also have held that the court should not become involved in the unnecessary determination of constitutional questions—here under the Supremacy Clause, on premature challenge, based on an undeveloped regulatory record—under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[5] *See* Louisiana Annotated Statutes § 33-4405; New Orleans Ords. Nos. 6822 and 7068.

[6] Section 4-1604 of the 1954 Home Rule Charter, provides for prompt judicial review of the Council's actions. The Court is empowered to grant plenary relief. *See* La. Const., Art. 4, § 21(E). Louisiana courts have vigorously enforced the filed rate doctrine. (CNO Br. p. 17 n. 22.)

[7] *See Middlesex County, Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 432-43 (1902); *United Services Automobile Association v. Muir*, No. 85-5662 (3d Cir. Jun. 6, 1986) *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981).

tinuing surveillance[8]—violated the complainant school's Constitutional rights. 766 F.2d 932, 942-43, 961-62 (6th Cir. 1985). This Court reversed, noting that the school's claims could be raised at state level. It restated that it is, "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 106 S. Ct. at 2723. (Emphasis by the Court.)

The Government contends that *Younger* is inapplicable here, claiming erroneously that NOPSI participated in a "multistate 'common pool' " and that a decision one state has "a corresponding direct adverse effect on the citizens of other participating states," (G.Br. at 18). The Council never acted, and it would have been inappropriate to speculate that its decision would burden other states. The Council also disclaimed any action that would have NOPSI bear any costs other than those assigned by the FERC (Resolution No. R-85-636). Moreover, each of NOPSI's three sister operating companies, also allocated Grand Gulf costs, entered into rate agreements that involved "phase-in" plans and cost absorption.[9] These did *not* have a "corresponding direct adverse effect" on NOPSI, and its president so testified.[10]

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[8] The state had sought extensive discovery and used its "coercive tools" to compel practices inconsistent with complainant's tenets. 766 F.2d at 950-51.

[9] *Arkansas Power and Light Company*, Docket No. 84-249-U, Order No. 26 (Arkansas Public Service Commission, Sept. 9, 1985); *Mississippi Power and Light Company*, Docket No. U-4620, Final Order on Rehearing (Mississippi Public Service Commission, Sept. 16, 1985); *Louisiana Power and Light Company*, Order No. U-16945 (Louisiana Public Service Commission, Nov. 14, 1985).

[10] Deposition of James M. Cain, December 23, 1985, *In the Matter of Ex Parte Application of New Orleans for An Increase of Its Electric Rates* (Docket No. CD 85-1), pp. 125-131.

B. There is no conflict among the circuits.

As to the Government's claim that abstention is never warranted "in the context of a preemption claim based on the filed rate doctrine," there is clearly no conflict since *not one* court has suggested such a rule. Because *all five* of the cases proffered by the Government are distinguishable, there is no conflict at all.

(1) In *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3d Cir. 1986), the court declined to abstain where a particularized state response had been fully articulated—by *all three* branches of the government. 791 F.2d at 1113, 1114, 1118.

(2) In *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), the state proposed to void *ab initio* the agreements with respect to Grand Gulf, 772 F.2d at 408, so that the utility might avoid *any* costs assigned by the FERC, *id.* at 411. There was *complete* preemption.

(3) In *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), the court abstained where the state commission had taken substantive action; the state courts were in an "advanced stage" of considering the matter, 713 F.2d at 1029; and fact-finding would be required as to the effect of the utility commission's order. *Id.* at 1030.

(4) In *Appalachian Power Co. v. Public Service Commission of West Virginia*, No. 86-2540 (4th Cir. Mar. 4, 1987), previously briefed,[11] the same court demonstrated willingness to reach a preemption claim, and it barred a state prudence inquiry where the particularized issues were *identical* to those already determined by the FERC. (Slip Op. at 13).

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[11] Respondents' Brief In Opposition To Petitioner's Third Supplemental Brief, Filed March 30, 1987.

(5) In *American Electric Power Company, Inc. v. Kentucky Public Service Commission*, the Sixth Circuit affirmed abstention under *Younger*, (although it held *Burford* inapplicable because the state commission had *already acted*) because of parallel proceedings in the state court.

C. Other Factors Bearing on Review.

The abstention issue is important only if the Court were to upset the particularized consideration that now characterizes court decisions. If local regulators were stripped of their powers to moderate increases, there would be irreparable economic damage, the Congressional judgment in favor of localized adjustment would be undermined, and utilities would be encouraged to exhaust local resources by litigation that sought federal intrusion into a traditionally state process—a course followed by NOPSI here.

The Government erroneously asserts that utilities will be subjected to "irreparable damages".(G.Br. at 23). Local regulators can grant *interim* relief and provide for recovery of costs borne during the proceeding. (Resolution No. R-85-526.) Financial planning by utilities is customarily based on an interlude for regulatory consideration. The claim that it is not lawful in most jurisdictions to allow for costs incurred during the regulatory interim is specious.[12] In fact the rate agreement here included recovery

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[12] The Government concedes that Resolution No. R-85-526 allowed NOPSI to recover costs incurred during regulatory consideration, but suggests that the Council "appears not to have the authority to make that guarantee." It cites only *Louisiana Power & Light Co. v. Louisiana Public Service Comm'n.*, 377 So.2d 1023, 1027-1029 (La. 1979). That case addressed the different problem posed when a utility "surcharged" retroactively a class of ratepayers to recover a refund made to a different class, and it does not address regulatory inclusion of deferred costs in rates. NOPSI earlier raised this argument in *Middle South Energy, Inc. v. The City Council of New Orleans*, Civ. Action No. 85-5273 (E.D. La., Dec. 11, 1985) (*"NOPSI II"*) but was met by undisputed testimony that the Council's action conformed with others nationwide, all under state laws barring "retroactive ratemaking."

of such costs. Instead, the Government would subject communities to irreparable damage because it is impossible to reconstitute closed businesses or repatriate residents forced to relocate as a result of rate shock. However, no court has adopted the Government's position.

The states' obligation to reflect costs allocated by the FERC has just been explicated in *Nantahala*, relied upon by the court below. Since *Nantahala* applies to wholesale costs of "joint financing and power production arrangements," which the Government posits as a basis for review here (G.Br. 22), there is no need to review the issue.

Finally, any decision here would be rendered in the context of a FERC allocation which may itself be ephemeral. The appeal of its decision will be reheard *en banc* "limited to the issues raised by the dissenting opinion." *Mississippi Industries v. FERC*, No. 85-1611, (D.C. Cir. Apr. 3, 1987). That dissent found untenable the FERC's allocation of nuclear plant costs that failed to remedy the disparities which it held discriminatory. *Id.*, Slip Op. at 1-3 (D.C. Cir. Jan. 6, 1987) (Bork, J., dissenting).

D. Comparison with the AEP case

The Government concedes that the issue here is "blemished by procedural problems" (G.Br. 23), but argues for review here, but not in *AEP*. In *AEP*, the state commission had already acted. Here, the complaint was filed before the Council had a chance to act, and while NOPSI bypassed opportunities for interim relief.[13] In *AEP*, the controversy is active; here, it has been settled.

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[13] The Government contends that *Younger* abstention is inappropriate because the Council's ratemaking proceedings are "essentially a legislative function." (G.Br. 19 n.11) They are no more "legislative" than the FERC's own. The hearings are governed by rules of procedure, provide for cross examination, are fully transcribed, result in written decisions, and are subject to state court review (*see* n.6 *supra*). The Government's suggestion that the Council's deliberations should be ov-

E. The Prudence Proceedings.

The Government misstates that NOPSI's complaint "necessarily includes" a challenge to the prudence inquiry. It did not, and the Fifth Circuit conducted no review of it. The inquiry was initiated after the complaint here was filed (Res. R-85-636, Oct. 17, 1985). Moreover, NOPSI commenced an entirely separate action, challenging that inquiry, "*NOPSI II*," now pending before the Fifth Circuit.

The Government also misstates that the prudence inquiry was causally related to the Council's alleged refusal (which did not occur) to reflect NOPSI's costs in retail rates. In fact, the rate agreement was implemented *notwithstanding* the inquiry. The complaint in *NOPSI II*, conceded that "Defendants failure to grant adequate rate relief is not at issue in the present case." (Compl. Par. 10.)

The Government asserts that the Council has no authority to conduct a prudence inquiry even though FERC has conducted no such inquiry. (*See* CNO Br. at p. 5, n.6.) Resolution, R-85-636 declares that, "the Council will not seek to . . . order NOPSI to pay MSE a rate other than that approved by the FERC." The prudence hearings, now complete, have focused on whether NOPSI's management acted imprudently in respects which would *not* disturb its interstate commitments. It is improper to presume that the Council will act in a manner violating its Constitutional responsibilities. More important, this issue is not before the Court in this case.

CONCLUSION

For these reasons the petition should be denied.

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erridden because it is popularly elected denigrates those who have responsibility to an electorate and would disqualify a substantial number of state trial and appellate courts. The suggestion that the Council might act improperly here because it also is considering a proposal to municipalize NOPSI, merits no reply. The same argument would undermine the integrity of the New York State Public Utility Commission with respect to the Long Island Lighting Company, since the Commission is appointed by the Governor, who is championing state takeover of that utility. Wall St. Journal, Jan. 15, 1987, at 10, col. 1.

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NO. 86-546

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondents' opposition treats the Council's retail rate-making rights and the Council's obligation under the filed rate doctrine as though those were the same thing: Matters over which the Council has authority.[1] This "blending" of the Council's rights and obligations is a fallacy common to each of respondents' arguments. By separating the Council's rights from its duty under the

[1] In setting retail rates, the Council has the right to determine the appropriate cost of capital, the rate base, the revenue requirement and how it should be spread among the residential, commercial and industrial customer classes, even the timing of a phase-in, so long as the utility fully recovers its revenues together with the cost of financing the deferral of collection of those revenues. When setting retail rates, however, the Council does not have the right to disregard FERC-imposed costs; it has the *obligation* to give effect to such costs. *Nantahala Power & Light Co. v. Thornburg*, _____ U.S. _____, 106 S.Ct. 2349, 2357 (1986).

filed rate doctrine, the issues in this case can be properly analyzed.

1. *Respondents' Mootness Argument.*

The respondents are correct that the traditional retail rate-making issues were resolved by the partial settlement. The respondents are incorrect, however, in their assertion that resolution of those issues, which merely address the Council's traditional authority to regulate retail rates, renders PUBLIC SERVICE's case moot. The gravamen of PUBLIC SERVICE's complaint -- that the Council exceeds its authority when it refuses to recognize fully PUBLIC SERVICE's FERC-mandated costs for purposes of calculating retail rates -- has not been resolved.[2]

The "heavy" burden of demonstrating mootness[3] rests upon the party who alleges it. *County of Los Angeles v. Davis,* 440 U.S. 625, 632 (1979). In *Davis*, this Court established a two-prong test to determine whether intervening events render a pending case moot, stating that

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[2] PUBLIC SERVICE did not seek to enjoin the Council's resolution of those retail rate-making issues over which the Council properly has authority. Those issues have now been resolved as a result of a partial settlement between the Council and PUBLIC SERVICE (see Pet. at 6, n. 7). That partial settlement did not, however, resolve the issue raised by PUBLIC SERVICE's complaint: Whether, for purposes of calculating PUBLIC SERVICE's retail rates, the Council may choose an allocation of cost and power from Grand Gulf Unit 1 that differs from the allocation mandated by the FERC.

[3] The district court, which was made aware of the partial settlement, did not vacate its order and dismiss the matter as moot; neither did the Fifth Circuit when it was made aware of the partial settlement. The Council obviously does not consider this matter to be moot; it did not terminate its docket No. CD-85-1 following the partial settlement. It is continuing to hold hearings and proceedings to address how much of PUBLIC SERVICE's FERC-imposed costs should be excluded from the retail rate recovery.

a case is rendered moot if:

> 1.) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur [citations omitted], and
>
> 2.) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation [citations omitted].

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). *See also Jacksonville Bulk Terminal, Inc. v. International Longshoreman's Association*, 457 U.S. 702 (1982), and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982).

The respondents must prove that both conditions are satisfied to prevail on their mootness argument, yet neither condition is satisfied in this case. Where, as here, the Council is proceeding to determine whether $150 million *or more*[4] of PUBLIC SERVICE's FERC-mandated costs will be excluded in calculating PUBLIC SERVICE's retail rates, it cannot "be said with assurance that there is no reasonable expectation that the alleged violation [of the filed rate doctrine] will recur." *County of Los Angeles v. Davis*, 440 U.S. at 631. The Council is proceeding to determine how much of PUBLIC SERVICE's FERC-imposed costs are to be excluded by the Council for purposes of

---

[4] "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496-498 (1969)." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984). The Council is presently engaged in hearings to determine how much of PUBLIC SERVICE's allocation of costs and power from Grand Gulf Unit 1 will be excluded by the Council for purposes of calculating the rates to be charged PUBLIC SERVICE's retail customers. The Council's various consultants have proposed excluding from retail rates *as little as* $150 million and as much as 65% of PUBLIC SERVICE's FERC-imposed costs.

calculating PUBLIC SERVICE's retail rates, not because of a determination or finding that costs *other than* those resulting from the purchases of FERC-regulated power were to decrease, *Nantahala*, 106 S.Ct. at 2357, but because the Council is not satisfied with the allocation established by the FERC and chooses instead to calculate PUBLIC SERVICE's rates as though PUBLIC SERVICE had been allocated less of the "more expensive purchased power than under FERC's order." *Nantahala*, 106 S.Ct. at 2359.

Further, the interim event to which the Council points (the partial settlement) does not completely or irrevocably eradicate the effects of which PUBLIC SERVICE complains because the Council, in the partial settlement, specifically reserved its "right" to reduce the portion of PUBLIC SERVICE's FERC-mandated costs used in calculating PUBLIC SERVICE's retail rates. Simply vacating the Fifth Circuit's amending opinion would not suffice; indeed, it would perpetuate the error.[5]

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[5] First, it would not bring the controversy to a close, *Stotts*, 467 U.S. at 586 (O'Connor, J., concurring); further, unless that expression of the Fifth Circuit is reversed, it will have precedential weight that will cause other district courts to reach the wrong result.

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, *O'Connor v. Donaldson*, 422 U.S. 563, 577-578, n.12 (1975); *A. L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329-330 (1961); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . Circuit.

Davis, 440 U.S. at 446 (Powell, J., dissenting).

2. *The Abstention Argument.*

Citing *Burford*[6] for the principle that federal courts should not disrupt a *state* regulatory scheme, respondents treat their rights and their obligations as part of the same *state* regulatory scheme, and conveniently ignore the fact that PUBLIC SERVICE's complaint involves a subject upon which a state regulatory scheme may not entrench. To paraphase this Court's most recent opinion addressing the extent and breadth of the filed rate doctrine:

> There is only [the Council's] assertion that [PUBLIC SERVICE] should have obtained [less] of the FERC-regulated power than [PUBLIC SERVICE] is [responsible for] under FERC's order. Such a rationale runs directly counter to [FERC Opinion No. 234], and therefore *cannot withstand the preemptive force of FERC's decision.*

Nantahala, _____ U.S. _____, 106 S.Ct. at 2358 (emphasis added).

With respect to *Younger*[7] abstention, respondents again rely on "blending" the Council's rights with the Council's obligation to include, when calculating the retail rates that PUBLIC SERVICE may recover, PUBLIC SERVICE's FERC-mandated costs. Respondents' "important state interests" in such matters as rate design and phase-in were not challenged by PUBLIC SERVICE and have been resolved as a result of the partial settlement. What was challenged by PUBLIC SERVICE's complaint that has yet to be resolved does not pertain to an "important state interest"; it involves the filed rate doctrine, a

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[6] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[7] *Younger v. Harris*, 401 U.S. 37 (1971).

matter over which the Council has neither control nor authority.

3. *Ripeness, Exhaustion of Remedies.*

Respondents' argument regarding ripeness and alleged failure to exhaust administrative remedies is also afflicted with this fallacious "blending" of the Council's rights with the Council's obligation. There is no requirement for PUBLIC SERVICE to go through the vain and useless act of seeking an administrative ruling on the filed rate doctrine. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, _____ U.S. _____, 106 S.Ct. 2718, 2722, n.1 (1986), this Court addressed respondents' ripeness and exhaustion of remedies argument:

> We think that any ripeness challenge to respondents' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S., at 458-460. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in respondent's favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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In the Supreme Court of the United States

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VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6 of the Rules of the United States Supreme Court, *Tiverton Board of License Commissioners v. Pastore,* 469 U.S. 238 (1985) and *Fusari v. Steinberg,* 419 U.S. 379 (1975), petitioner, New Orleans Public Service Inc., files this Supplemental Brief to call attention to recent decisions not available at the time of the last filing by petitioner.

On January 6, 1987, the Court of Appeals for the District of Columbia Circuit affirmed Opinion No. 234 of the Federal Energy Regulatory Commission [FERC]. *Mississippi Industries v. FERC,* ____F.2d____, No. 85-1611 (D.C. Cir. Jan. 6, 1987). The decision of the Court of Appeals is unpublished at this time and is reprinted in Appendix 1 hereto.

At page 9 and in footnote 9 of their Brief, Respondents refer to a case as "NOPSI II." That case was dismissed by the Federal district court on December 18, 1986. *Middle South Energy, Inc. et al. v. City of New Orleans, et al.,* Civil Action No. 85-5273 (E.D.La. Dec. 18, 1986). The decision of the District Court is unpublished and is reprinted in the Appendix 2 hereto.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1611

MISSISSIPPI INDUSTRIES, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

MISSOURI PUBLIC SERVICE COMMISSION,
MISSISSIPPI POWER & LIGHT COMPANY,
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
CITY OF NEW ORLEANS, LOUISIANA,
MISSISSIPPI PUBLIC SERVICE COMMISSION,
STATE OF ARKANSAS,
UNION CARBIDE CORPORATION,
OCCIDENTAL CHEMICAL CORPORATION,
ARKANSAS & MISSOURI CONGRESSIONAL DELEGATIONS,
LOUISIANA PUBLIC SERVICE COMMISSION,
ARKANSAS PUBLIC SERVICE COMMISSION,
JEFFERSON PARISH, LOUISIANA,
ARKANSAS POWER & LIGHT COMPANY,
MIDDLE SOUTH ENERGY, INC.,
MIDDLE SOUTH SERVICES, INC.,
and CITIES OF CONWAY AND WEST MEMPHIS, ARKANSAS,
INTERVENORS

Nos. 85-1613, 85-1620 & 85-1621

MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1615

ARKANSAS POWER & LIGHT COMPANY, PETITIONER

v.

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v.

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FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1619

REYNOLDS METALS COMPANY, *et al.*, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

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EDWIN LLOYD PITTMAN, Attorney General of the State of Mississippi, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1624

ARKANSAS AND MISSOURI CONGRESSIONAL DELEGATIONS, PETITIONER

v.

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ARKANSAS PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

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v.

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No. 85-1640

MISSISSIPPI LEGAL SERVICES COALITION, PETITIONER

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FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1647

CITY OF NEW ORLEANS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1712

MISSOURI PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1719

Representative WEBB FRANKLIN, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 85-1772

JEFFERSON PARISH, LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued March 24, 1986

Decided January 6, 1987

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Carl D. Hobelman, with whom *Jerry D. Jackson*, *M. Remy Ancarrow*, and *Robert J. Glasser* were on the brief, for petitioner Arkansas Power & Light Company.

J. Cathy Lichtenberg, with whom *Wallace L. Duncan*, *James D. Pembroke*, *Janice L. Lower*, *Martin C. Rothfelder*, *William Massey*, *Steve Clark*, and *Mary B. Stallcup* were on the brief, for petitioners Arkansas Public Service Commission, *et al.*

Hiram C. Eastland, Jr., with whom *Edwin L. Pittman*, *Frank Spencer*, *John L. Maxey, II*, and *Alfred Chaplin* were on the brief, for petitioners Mississippi Public Service Commission, *et al.*

James K. Child, Jr., with whom *Paul H. Keck*, *Michael F. Healy*, *Douglas L. Beresford*, *Robert R. Nordhaus*, *Adam Wenner*, *Howard Eliot Shapiro*, and *Margaret A. Moore* were on the brief, for petitioners Mississippi Industries, *et al.*

Glenn L. Ortman, with whom *Clinton A. Vince* and *Paul E. Nordstrom* were on the brief, for petitioner City of New Orleans.

Michael R. Fontham, with whom *David B. Robinson* and *Paul L. Zimmering* were on the brief, for petitioner Louisiana Public Service Commission.

Peter C. Kissel, *Richard G. Morgan*, *Earle H. O'Donnell*, and *Robert R. Morrow* were on the brief for petitioners Occidential Chemical Corporation, *et al.*

A. Karen Hill, Attorney, Federal Energy Regulatory Commission, with whom *William H. Satterfield*, General Counsel, *Jerome M. Feit*, Solicitor, and *John N. Esler, III*, Attorney, Federal Energy Regulatory Commission, were on the brief, for respondent.

Richard M. Merriman, *Robert S. Waters*, and *James K. Mitchell* were on the brief for intervenors Middle South Services, Inc., *et al.*

William A. Chesnutt entered an appearance for intervenor Union Carbide Corporation.

Before EDWARDS and BORK, *Circuit Judges*, and WRIGHT, *Senior Circuit Judge*.

Opinion *per curiam*.

Separate opinion by *Circuit Judge* BORK, concurring in part and dissenting in part.

PER CURIAM: We consider eighteen consolidated petitions for review of two orders of the Federal Energy Regulatory Commission (FERC or the Commission).[1] In the orders under review the Commission held that the four operating companies of the Middle South Utilities (MSU) system must share the costs of MSU's investment in nuclear energy in proportion to their relative demand for energy generated by the system as a whole. The Commission implemented this scheme by reallocating responsibility for investment costs associated with the catastrophically uneconomical Grand Gulf I nuclear plant. The parties attack both the Commission's jurisdiction and the rationality of its decision. Although the Commission's allocation of nuclear investment costs is subject to reasonable dispute, we do not think such criticisms warrant reversal of FERC's orders. We therefore affirm.

I. BACKGROUND

The controversy facing the court today stems from the pattern of power generation investment cost sharing practiced by Middle South Utilities and its operating companies. In order to address fully the proper allocation of the costs of nuclear power generation among those companies, we review MSU's structure, the history of its involvement in nuclear power generation, and the record of the proceedings below.

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[1] *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC ¶ 61,305 (1985), and *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC ¶ 61,425 (1985) (opinion on rehearing).

A. *The Middle South System*

1. *Corporate structure.* Middle South Utilities, Inc. is a registered holding company under the Public Utility Holding Company Act of 1935 (PUHCA). 15 U.S.C. § 79 *et seq.* (1982). It owns outright four utility operating companies: Louisiana Power & Light Co. (LP&L), New Orleans Public Service, Inc. (NOPSI), Arkansas Power & Light Co. (AP&L), and Mississippi Power & Light Co. (MP&L). *See Middle South Energy, Inc.*, 26 FERC ¶ 63,044, 65,098 (1984). The operating companies sell electricity, both wholesale and retail, in the states of Louisiana, Arkansas, Missouri, and Mississippi.[2]

Although each operating company has a separate board of directors, the sole stockholder, MSU, selects each director. In addition, the various companies do have common or overlapping officers and directors. The Chairman and Chief Executive Officer (CEO) of MSU is a member of the board of each operating company and the CEOs of the operating companies are members of the board of MSU. Other MSU board members are also board members of individual operating companies. *Middle South Services, Inc.*, 30 FERC ¶ 63,030, 65,142 (Docket No. ER82-463-000) (ALJ Head).

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[2] MSU also owns a corporate services company, Middle South Services, Inc., and a fuel purchasing company, System Fuel, Inc. *See Middle South Services, Inc.*, ER82-483-000, 30 FERC ¶ 63,030, 65,141-42 (1985).

One useful way of viewing the relative size of the companies is to compare their relative shares of the system's average demand:

	Share of Total System Load
LP&L	44%
AP&L	33%
MP&L	15%
NOPSI	8%

See Middle South Energy, Inc., ER82-616-000, 26 FERC ¶ 63,044, 65,109 (1984). These figures are based on average load demand in 1982.

Transactions among the various operating companies are governed by a System Agreement. Over its history, MSU has filed three successive System Agreements—in 1951, 1973, and 1982. The Commission scrutinizes the System Agreement and modifies it when necessary. *See, e.g., Middle South Services, Inc.*, 16 FERC ¶ 61,101 (1981) (modifying the 1973 System Agreement), *aff'd*, 688 F.2d 357 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). Section 3.01 of the Agreement states the system's general goal of operating as a coherent unit:

> The purpose of this Agreement is to provide the contractual basis for the continued planning, construction, and operation of the electric generation * * * facilities of the Companies in such a manner as to achieve economies consistent with the highest practicable reliability of service * * *. This agreement also provides a basis for equalizing among the Companies any imbalance of cost associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies.

483-R. 7117, VII Joint Appendix (JA) 1569.[3] In light of this language, Administrative Law Judge (ALJ) Head found that the MSU system has sought to coordinate the addition of operating capacity by each individual operating company while achieving the greatest economies of scale.[4] As he observed:

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[3] Citations to the record in *Middle South Services, Inc.*, ER82-483-000, 30 FERC ¶ 63,030 (1985), are noted as "483-R." Citations to the record in *Middle South Energy, Inc.*, ER82-616-000, 26 FERC ¶ 63,044 (1984), are noted as "616-R."

[4] Specifically, ALJ Head found:

> Article III of the Agreement provides, *inter alia*, for planning, construction and operation of both power supply and related facilities on a coordinated basis (Section 3.02); for moving toward a new fuel base of coal and nuclear to minimize costs and reduce dependence on gas

> The System Agreements * * * clearly permit and encourage, for efficiency, reliability, and other economies of scale, that the individual companies from time to time build larger facilities than are necessary to meet their own native load, to benefit all the generating companies by having lower costs and greater reliability. * * *

30 FERC at 65,142.

All three System Agreements have assigned the task of coordinating the planning of new generating capacity to a systemwide Operating Committee.[5] The CEO of each operating company designates one member of the committee, as does MSU. The members representing the operating companies control 80% of the votes on the committee, apportioned according to each individual company's share of the system's investment in generating capacity. The representative of MSU votes the remaining 20%. Under Section 5.04 of the System Agreement, the Operating Committee can now take action on the basis of a bare majority. 483-R. 7129, VII JA 1581.

2. *Investment cost sharing.* As ALJ Liebman noted, the MSU system planning approach to new generating capacity inevitably results in certain operating companies having less generating capacity than do others for varying periods of time. *See* 26 FERC at 65,098 (Docket No.

> and oil (Section 3.03); for a long-term goal of each company having a proportionate share of coal and nuclear units available to serve its customers * * *; and for joint planning on a system-wide basis for construction and operation of major facilities to achieve economies of scale associated with construction and operation of larger generating units * * * (Section 3.08).

30 FERC at 65,122.

[5] Thus under § 5.06(c) of the 1982 System Agreement the Operating Committee is responsible for, *inter alia*, determining the amount of reserve capacity on the system and requiring the installation of that capacity. *See* 483-R. 7130, VII JA 1582.

ER82-616-000). If a company does not have enough capacity to meet the needs of its consumers, the deficient operating company can always draw on the excess capacity of the other companies on the system.[6] This system also benefits those companies that have built more capacity than necessary to meet current demand. Such companies generally find willing buyers of their surplus among the other companies on the system.[7]

Under the system planning approach, it is inevitable that an operating company will, from time to time, provide a proportionate share of the system's investment in generating capacity that is more or less than its proportionate demand for the system's energy. If a company's share of the system's generating *capacity* is greater than its share of the *energy* actually generated and distributed by the system as a whole, the company is deemed to be "long." If the company's share of the system's generating capacity is *less* than its percentage of the system's energy, the company is deemed "short." 26 FERC at 65,099.[8]

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[6] For example, in the 1960's and 1970's AP&L almost never had enough capacity to service its native load, and frequently drew on LP&L's capacity to make up the deficiency. 26 FERC at 65,098-99.

[7] All energy on the system is dispatched from a central office in Pine Bluff, Arkansas. 30 FERC at 65,142. The System Agreement establishes a schedule called MSS-3 setting rates for the purchase of energy from the system pool. When a company needs energy it is billed for the lowest cost energy available in the pool. Companies owning the capacity that generates such low cost energy have first claim to that energy. 483-R. 7151, VII JA 1603. When a company needs more energy than its native capacity can produce it therefore must stand in line behind the other companies for access to the relatively cheapest kilowatts.

[8] The terms "long" and "short" do *not* refer to a company's ability to provide enough energy to meet its customers' requirements. Instead, they reflect a comparison of the share of system capacity contributed by a particular company with the share of the system's energy utilized by that company. It is entirely possible that a company could be "short" and

Since 1951 the MSU system has sought to iron out the inequities that would otherwise result where some companies were long while other companies were short through a system of "equalization payments." Prior to 1973 each "short" company made a payment to the "long" companies based on a fixed dollar amount per kilowatt of capacity that the company was short.[9] In 1973 the System Agreement was amended to provide for capacity equalization payments calculated under the "participation unit" formula, a formula that based payments on the ownership costs of the latest unit constructed by the "long" company.[10] *See id.*; *see also* 30 FERC at 65,122-23.

Importantly, this new system did *not* call for equalization payments based on the relative number of *dollars* each company had invested in generating capacity. Instead, the relative number of *kilowatts* of generating capacity owned by each company formed the basis for the payments. Because kilowatts can vary in cost, the system potentially perpetuated the operating companies' relatively unequal investment in generating capacity.

For over twenty-five years, however, the system largely avoided this potential inequity. Notwithstanding its limitations, the equalization payment approach managed to produce the *effect* of roughly equalizing the cost of investing in new capacity from the 1950's through the 1970's. During the years in which the 1951 System Agreement was in force the cost of creating such capacity was relatively uniform and relatively constant. *See* 616-R. 1332-

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still have more than enough capacity to meet its own needs. 26 FERC at 65,099.

[9] Specifically, the 1951 System Agreement provided for a monthly payment of $1.10 per kilowatt by which a company was "short." *See* 483-R. 7398, VII JA 1786.

[10] This approach also provided for the "short" company receiving an entitlement to a proportionate share of the energy generated by the "participation unit." 26 FERC at 65,099.

33, I JA 140-41; 30 FERC at 65,168.[11] As a consequence, the System Agreement's allocation of equalization payments based on a constant dollar per kilowatt of short capacity served to equalize investment costs. Although in the 1970's the cost of new units began to exceed that of older facilities by a substantial margin, the 1973 System Agreement balanced this development by basing equalization payments on the costs of the newest (and more expensive) units of the "long" companies. 26 FERC at 65,100.[12]

3. *The shift to nuclear energy and its consequences.* In the 1950's and 1960's the MSU system tended to add new generating units in the southern part of the system to take advantage of cheap oil and gas reserves in Louisiana. *See* 26 FERC at 65,100; 30 FERC at 65,143. In the late 1960's, however, the system began a program of adding coal and nuclear generating capacity, 30 FERC at 65,144, that eventually resulted in the collapse of the investment equalization program.

AP&L was the first operating company to make such an investment in nuclear power. AP&L had historically been both a short company and one with insufficient capacity to meet the requirements of its customers. 30 FERC at 65,143. Moreover, AP&L had been losing its long-term gas contracts while Louisiana and Mississippi continued to have an adequate supply of gas and oil. 26 FERC at 65,101. In December 1974 AP&L brought on

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[11] *See also* 30 FERC at 65,143-44 (indicating that the units added in the 1960's and early 1970's were priced between $58 and $97 per kilowatt).

[12] ALJ Liebman also credited testimony indicating that two other factors promoted equalization of overall generation costs. First, responsibility for adding new capacity generally rotated among the operating companies, evening out investment costs over time. Second, the burden borne by companies adding relatively more expensive new capacity was often offset by the lower fuel costs associated with such units. *See* 26 FERC at 65,100.

line MSU's first nuclear plant, Arkansas Nuclear One (ANO) Unit 1.

Although ANO 1's capacity was substantially more expensive than that of non-nuclear generating units built at the time,[13] 26 FERC at 65,100-01, the lower fuel costs of a nuclear unit made the *total* generation costs of ANO 1 comparable to those of other plants brought on line in the 1970's.[14] Thus it is fair to say that the basic system of roughly equalizing the costs and benefits derived from the system's investment in new capacity remained intact.[15]

The picture changed radically with the development of two new nuclear units—the Waterford 3 unit (assigned to LP&L) and Grand Gulf 1 (initially assigned to MP&L). Grand Gulf was initially projected to cost $1.2 billion for two generating units.[16] Regulatory delays, additional construction requirements, and severe inflation ran up Grand Gulf costs to in excess of $3 billion for one unit.[17] Similar cost over-runs marred the construc-

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[13] Capacity cost of ANO 1 was $276 per kilowatt, nearly double that of the oil-fired units introduced by MP&L and LP&L during the same period. 26 FERC at 65,101; 30 FERC at 65,144.

[14] 30 FERC at 65,144. The initial cost was about 3 cents per kilowatt hour. 26 FERC at 65,101.

[15] Nor did this basic pattern change substantially with the introduction of ANO 2 in 1980. Although ANO 2 had cost substantially more per kilowatt than did ANO 1, AP&L's *total* nuclear capacity is still quite reasonably priced at $500 per kilowatt or 3-4 cents per kilowatt hour. *See* 30 FERC at 65,145.

[16] Grand Gulf, for example, was originally projected to come on line at a cost of approximately $500 per kilowatt, a price comparable to that of the average price per kilowatt of the two ANO units. 26 FERC at 65,103.

[17] This figure was presented in the Commission's initial opinion. 31 FERC at 61,632. In determining the allocation

tion of Waterford 3. *See Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC ¶ 61,305, 61,654 (1985). These units produce the most expensive energy on the MSU system. Measured in dollars per kilowatt of generating capacity, the new units were five times costlier than the ANO units installed by AP&L.[18] Most important, although these two plants have been estimated to represent over 70% of the production costs of the MSU system, they apparently will produce only 13% of the electricity used on the system. 30 FERC at 65,121.

Under these conditions, continued application of a capacity equalization scheme that only sought to equalize *kilowatts* could no longer come close to equalizing investment *dollars*. Any operating company saddled with re-

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of Grand Gulf capacity the Commission adopted the figures used by ALJ Liebman in his initial decision. *Id.* at 61,657. ALJ Liebman relied on the following cost estimates: $2.5 billion for Grand Gulf 1 and $2.4 billion for Waterford 3. *See* 26 FERC at 65,107. These figures represent the cost of these units as of December 31, 1981, rather than on the date of commercial operation (which was several years later). Thus ALJ Liebman conceded that the projected cost of Grand Gulf 1, as of 1984, was $2.8 billion. *See id.*

ALJ Head relied on a different, higher, and presumably more recent, set of figures. His conclusion that the new nuclear units would cost approximately $2,500 per kilowatt, 30 FERC at 65,121, was based on the testimony offered by Mr. Louiselle, a witness for LPSC, who, in the portion of the transcript cited by the ALJ, assumed that MSE's 90% share of Grand Gulf 1 would cost $2.92 billion and Waterford 3 would cost about $2.76 billion. *See* 483-R. 4124-26, VI JA 1452.

[18] ALJ Head estimated that Grand Gulf 1 and Waterford 3 would come on line at a cost of $2,500 per kilowatt. By contrast, he found that the two ANO units came on line at a cost of about $500 per kilowatt. 30 FERC at 65,121. ALJ Liebman estimated that Grand Gulf 1 would come on line at a cost three to four times greater than that of any unit already on the MSU system. *Id.* at 65,103.

sponsibility for Waterford 3 and/or Grand Gulf would likely find itself paying far more per kilowatt of capacity than would an operating company that was free of such a burden. 26 FERC at 65,100.

It is true that MSU filed a new System Agreement in 1982 altering its previous equalization scheme. Unlike the 1973 Agreement, which had pegged equalization payments to the cost of the long company's most recent generating addition, the 1982 Agreement provided for equalization payments based on the long company's "intermediate" (*i.e.*, oil and gas) units. 483-R. 7137-50, VII JA 1589-96. This change reduced the burden on any company that might be *both* short and have substantial responsibility for the new nuclear plants.[19] But, as discussed below, this change did not eliminate the major inequities that nuclear power introduced to the MSU system.[20]

4. *The Grand Gulf plant.* The Grand Gulf project was initiated by MSU to meet the then projected demand for electricity by the *system as a whole.* 26 FERC at 65,101-02. By the late 1970's, however, it became clear that projected demand would fall well short of previous expectations.[21] Nonetheless, MSU continued to build Grand Gulf 1[22] on the assumption that the overall cost per

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[19] On the other hand, the new agreement did not provide for an entitlement to the "intermediate" kilowatts of energy produced by the long company. Thus the short company might still have to purchase expensive nuclear energy whenever it lacked the capacity to meet its native load. 30 FERC at 65,140.

[20] Moreover, the new equalization scheme actually made matters worse for any company that was both *long* and retained substantial responsibility for one of the new plants.

[21] Indeed, as ALJ Head observed, the entire MSU system now has much more capacity than it needs. 30 FERC at 65,169.

[22] MSU, however, did halt construction of the second unit in the project, Grand Gulf 2. 31 FERC at 61,668 n.2. The Commission therefore did not decide on the allocation of

kilowatt hour would be less than that of alternative energy sources. 26 FERC at 65,102.[23]

Initially the plant had been assigned to MP&L.[24] It soon became apparent, however, that MP&L did not have the resources to finance the construction of the plant. As a consequence, MSU made a system decision to form Middle South Energy (MSE) in 1974 as a vehicle for financing Grand Gulf. MSE acquired full title to Grand Gulf. In June of 1974 all four Middle South operating companies entered into an "Availability Agreement" under which each operating company put its credit behind Grand Gulf.

Notwithstanding this initial agreement, at the time MSE was first formed no clear plan existed to allocate responsibility for Grand Gulf's capacity to each of the companies. Over the years various allocation plans were put forward, ultimately resulting in the Unit Power Sales Agreement (UPSA) at issue in this case.

Grand Gulf 2 costs, finding that issue to be purely speculative at this time. *Id.* at 61,669 n.20.

[23] This assumption is now questionable. Through the 1990's Grand Gulf will *not* produce energy that is cheaper than energy produced from alternative sources. Indeed, ALJ Liebman estimated that by 1993 ratepayers will pay $3 billion more for Grand Gulf energy than they would for energy from comparable sources. As of 1984 MSU was still predicting that Grand Gulf power would become economical at some future date and that at some (even later) point the project will represent a net benefit to consumers. 26 FERC at 65,103. As ALJ Liebman noted, however, the decline in the price of oil makes these projections appear rather dubious. *Id.*

[24] Grand Gulf is located in Port Gibson, Mississippi. Under the original plan each operating company in the system would be responsible for the financing and construction of a major nuclear facility. It was soon determined, however, that the site for the NOPSI plant near New Orleans was unsuitable; that unit was transferred to Mississippi. Responsibility for construction of both units shifted to MP&L. 26 FERC at 65,102.

At first it was contemplated that MSE would become a party to the System Agreement. Under this plan all of Grand Gulf would be a "participation unit" and responsibility for the plant's capacity would shift among the operating companies to the degree they were short. 616-R. 4122-23, II JA 505.

In 1979 MSU officials, having come to the conclusion that a fixed allocation of capacity was preferable to a scheme of shifting responsibilities, recommended a plan that would have allocated a share of Grand Gulf capacity to all of the operating companies.[25] But by early 1980 the MSU officers were moving toward a scheme absolving AP&L of all responsibility for Grand Gulf. In July of 1980 the CEOs of the MSU operating companies signed a Memorandum of Understanding, freeing AP&L of all responsibility for Grand Gulf. Although this Memorandum was never submitted to the Coordinating Committee, and therefore never became final, its basic terms were set forth in a "Reallocation Agreement" executed in July 1981. 616-R. 3275, I JA 268. Under the Reallocation Agreement AP&L assigned its entitlement to purchase Grand Gulf power to the other companies.[26] In addition,

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[25] In 1979 the Operating Committee of the MSU system recommended "Plan 4A" under which the operating companies would have the following responsibilities:

Company	Percentage
AP&L	11.11
LP&L	13.51
MP&L	49.60
NOPSI	25.78

26 FERC at 65,102. Although "Plan 4A" was tentatively approved by the MSU Board of Directors in November of 1979, the Board soon retreated from this position and, in January of 1980, approved an allocation plan quite similar to the UPSA. *Id.* at 65,103.

[26] In 1981 AP&L's share of Grand Gulf power under the Availability Agreement was calculated to be 17.1%, with

NOPSI, LP&L, and MP&L agreed to indemnify AP&L for any obligation it might incur to MSE's creditors. The Reallocation Agreement thus relieved AP&L of any responsibility for Grand Gulf capacity costs and provided the basis for the Unit Power Sales Agreement. 26 FERC at 65,103.

The Unit Power Sales Agreement was executed on June 10, 1982. Although all of the operating companies are signatories to the UPSA, it only provides for sale of Grand Gulf capacity and energy by MSE to three of the operating companies: LP&L, MP&L, and NOPSI, but *not* to AP&L. 26 FERC at 65,095.[27]

B. *The Proceedings Below*

In April 1982 MSU filed with the Commission the 1982 System Agreement, which set the general rules governing transactions between the operating companies, including capacity equalization payments and the rates governing the exchange of energy between the operating companies. FERC set the proceeding for hearing before ALJ Head. In June 1982 MSU filed the Unit Power Sales Agreement with the Commission, governing the sales of Grand Gulf capacity and energy by MSE to the four operating companies. This proceeding was set for hearing before ALJ Liebman.[28] ALJ Liebman issued his opinion

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LP&L responsible for 26.9%, MP&L responsible for 31.3%, and NOPSI responsible for 24.7%. 26 FERC at 65,102.

[27] UPSA assigns LP&L the entitlement to purchase 38.57% of the power available to MSE from Grand Gulf, MP&L 31.63%, and NOPSI 29.80%. 26 FERC at 65,097 (excluding Unit 2 percentages). MSE only owns 90% of Grand Gulf; 10% has been sold to South Mississippi Electric Power Association. *Id.* These figures therefore only refer to percentages of MSE's share of the Grand Gulf facility.

[28] By order issued August 25, 1982 the Commission accepted the UPSA for filing but found that it constituted a rate change rather than an initial rate filing; FERC therefore

on February 3, 1984, *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 (1984), and ALJ Head issued his opinion a year later, on February 4, 1985. *Middle South Services, Inc.*, 30 FERC ¶ 63,030 (1985). Both decisions touched on the allocation of Grand Gulf power, and FERC reviewed both decisions in an opinion issued June 13, 1985. *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC ¶ 61,305 (1985). It revisited the issue following petitions for rehearing in an opinion issued September 28, 1985. *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC ¶ 61,425 (1985).

1. *ALJ Liebman's decision in the UPSA case (ER82-616).* The principal issue[29] in ER82-616 was whether the UPSA's proposed allocation of Grand Gulf invest-

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suspended the rates which were to become effective under the UPSA, subject to refund. *See Middle South Energy, Inc.*, 20 FERC ¶ 61,206 (1982). On May 24, 1983 the Commission recharacterized the UPSA as an initial rate, but held that it had the authority to suspend initial rates. *Middle South Energy, Inc.*, 23 FERC ¶ 61,277 (1983). In *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984), this court reversed the Commission, holding that the Federal Power Act only permits suspension of changed rates.

On remand FERC determined that the Sales Agreement rates were changed rates after all, giving it authority to suspend them subject to refund. That decision was appealed to this court, but the appeal has been held in abeyance pending the outcome of this case. *See Arkansas Power & Light Co. v. FERC*, No. 85-1504 (D.C. Cir., filed Aug. 14, 1985). As matters stand, the rates filed in the UPSA were never suspended because FERC issued its final decision in Order No. 234, amending the UPSA, before service from Grand Gulf commenced. As we uphold FERC's decision here, the question whether the rates filed in the UPSA are subject to the suspension power of the Commission is now moot.

[29] ALJ Liebman, ALJ Head, and the Commission all addressed myriad issues that are not presented in the petitions before this court. These issues are not discussed in this opinion.

ment costs was reasonable and, if not, how such costs should be allocated. As a threshold matter, however, ALJ Liebman rejected a series of arguments suggesting that FERC did not have jurisdiction or statutory authority to amend this aspect of the UPSA.[30]

Having found jurisdiction, ALJ Liebman found that the UPSA was "unduly discriminatory" under Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a) (1982),[31] because it failed to allocate any portion of Grand Gulf's capacity costs to AP&L. He based this decision on his view of the MSU system as a highly integrated operation that made critical decisions—such as the decision to move into nuclear power—as a unit. Under that view ALJ Liebman thought it only fair that AP&L pay its share of the company's decision to build nuclear capacity. Having rejected the UPSA's allocation of Grand Gulf costs, ALJ Liebman was faced with three alternatives:

> (1) Making Grand Gulf a participation unit, with floating responsibility among the short(er) companies.[32]
>
> (2) Allocating responsibility for Grand Gulf capacity proportionate to each operating company's relative share of system demand, as fixed in 1982.[33]

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[30] He rejected, *inter alia*, the following arguments: (1) the reallocation of Grand Gulf costs violated the *Mobile-Sierra* doctrine, 26 FERC at 65,113-16; (2) the reallocation constituted a forced purchase of power barred by the Act, *id.* at 65,115-17; and (3) the PUHCA gives the Securities and Exchange Commission primary authority over the allocation of Grand Gulf costs, *id.* at 65,117.

[31] Section 205(b), 16 U.S.C. § 824d(b) (1982), similarly bars any "undue preference" in wholesale rates.

[32] This proposal was put forth by the Mississippi Public Service Commission.

[33] This proposal was put forward by the City of New Orleans. On appeal CNO has abandoned this view and adopted

(3) Allocating responsibility for Grand Gulf such that each operating company bore a share of the cost of *all* the nuclear units on the MSU system proportionate to that company's relative share of system demand, as fixed in 1982.[34]

26 FERC at 65,109.

ALJ Liebman chose the last proposal. As the Commission noted, this approach did not merely allocate the cost of Grand Gulf. By including the total system investment in nuclear power in his formula, ALJ Liebman effectively reallocated the costs of all nuclear capacity on the MSU system. 31 FERC at 61,633.

ALJ Liebman justified his exclusive focus on nuclear capacity costs—rather than on equalizing the costs of all

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that of ALJ Head, *i.e.*, the allocation of Grand Gulf capacity alone—and not that of all nuclear plants—but calculating that allocation on the basis of each company's relative demand for system load in any particular year. *See* Brief of Petitioner City of New Orleans, Louisiana at 48.

[34] This proposal was originally put forward by the Louisiana Public Service Commission and Occidental Chemical Corporation. As the Commission suggested, this alternative can be broken down into the following three-step process:

(1) *Calculating each company's nuclear responsibility ratio.* This ratio consists of each operating company's 1982 share of the system's total demand over the entire system's demand.

(2) *Calculating each company's share of total system nuclear investment.* This figure is derived from multiplying the total system investment in nuclear power by a company's nuclear responsibility ratio.

(3) *Calculating each company's share of Grand Gulf costs.* This amount equals the shortfall between the operating company's proportionate share of nuclear costs (estimated in step 2 and that company's own nuclear investment.

Each company would then receive an entitlement to Grand Gulf power corresponding to its relative contribution to Grand Gulf investment costs. 30 FERC at 61,655.

capacity investment or, even more sweeping, equalizing all generating costs—by claiming that the differences among non-nuclear base load[35] generation costs were minor compared to the cost differences among the nuclear generating facilities. 26 FERC at 65,110. He suggested that even under his proposal AP&L would still have the lowest total generation costs on the system. *Id.* at 65,119. He justified his decision to reallocate costs of Grand Gulf primarily by reference to the fact that the UPSA perpetuated discrimination caused by the timing of nuclear units by forcing the Louisiana and Mississippi ratepayers to pay about four times more for nuclear capacity than the Arkansas ratepayers would pay for their nuclear kilowatts. *Id.* at 65,107.

2. *ALJ Head's decision in the System Agreement case (ER82-483).* The principal issue in the System Agreement proceeding was whether FERC should approve that Agreement as filed or whether it should equalize[36] all or part of the production costs on the system. 30 FERC at 65,120. ALJ Head also considered a series of arguments militating against FERC jurisdiction over the reallocation of Grand Gulf costs and rejected them.[37]

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[35] "Base load" units are those units that are in continuous operation. By contrast, reserve units (oil and gas units) can be fired up quickly to meet special surges in demand. 483-R. 7112, VII JA 1564.

[36] In this context "equalization" does not mean that each operating company would pay the same absolute number of dollars. Rather, it means that each operating company would have to pay a share proportionate to its share of system demand.

[37] He rejected the following contentions: (1) that a reallocation of Grand Gulf costs violates the *Mobile-Sierra* doctrine, 30 FERC at 65,146-47; (2) that such a reallocation violates the ban on federal regulation of "generating" facilities contained in § 201(b) of the FPA, 16 U.S.C. § 824(b) (1982), 30 FERC at 65,148-50; (3) that such a reallocation constitutes a "forced sale" of power, barred by § 202(b) of the FPA,

Having found that FERC had the authority to reallocate production costs, ALJ Head faced the following alternatives:

(1) *Adoption of the System Agreement as filed.* This would entail allocating none of the Grand Gulf costs to AP&L and only equalizing the costs of capacity between "long" and "short" companies, with equalization payments pegged to the cost of the long companies' oil and gas investment costs.[38]

(2) *Equalization of production costs.* The basic concept,[39] presented by the Louisiana Public Service

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16 U.S.C. § 824a(b) (1982), 30 FERC at 65,154; (4) that such a reallocation expands federal regulation of a utility's rate base in a manner that improperly limits the power of the states over retail rates, 30 FERC at 65,149-51; (5) that the Public Utility Holding Company Act, 15 U.S.C. § 79 *et seq.* (1982), bars FERC jurisdiction in this matter, 30 FERC at 65,152-54; and (6) that the reallocation of Grand Gulf costs by FERC would present an obstacle to state certification of new generating plants. 30 FERC at 65,154.

[38] 30 FERC at 65,139. This proposal was supported by AP&L and various Arkansas interests in the proceedings before ALJ Head. The Arkansas parties continue to press this position on appeal.

[39] There were two variations on this theme:

(a) *Base load equalization.* This proposal would have required each operating company to bear a share of the system's "base load" (coal and nuclear) capacity proportionate to its share of system load. 30 FERC at 65,140. This proposal was supported by the Commission staff in the proceedings before ALJ Head and was before the Commission. 31 FERC at 61,635 & n.5. No party, however, has pressed this position on appeal.

(b) *Base load equalization combined with rough equalization of intermediate capacity.* This proposal would require base load capacity to be allocated in proportion to relative system demand while all other capacity would be equalized under the terms of the 1982 System Agreement, *i.e.*, short companies would compensate long com-

Commission, was to allocate responsibility for a share of *all* production costs on the MSU system proportionate to each company's share of the system's total load.[40]

(3) *Making Grand Gulf a participation unit.* This proposal would allocate responsibility for Grand Gulf capacity to each operating company to the degree that the company in question was "short." Under this scheme responsibility for Grand Gulf capacity would shift over time.[41]

ALJ Head rejected all of these proposals. He rejected the concept of making Grand Gulf 1 a participation unit primarily because it would allow long companies (*e.g.*, MP&L) to avoid completely the high front-end costs associated with that plant. 30 FERC at 65,166-67. He rejected the equalization proposals on the ground that overall cost equalization would be inconsistent with the general "pattern of autonomy * * * particularly as to * * * specific plant site locations, fuel and financing" that he found characterized the operating companies in the MSU system. *Id.* at 65,168.

ALJ Head found support for his finding of a "pattern of autonomy" in two circumstances. First, he stressed that the historic practice in the MSU system was to equalize only *excess* capacity. *Id.* at 65,167. Second, he

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panies, with equalization payments pegged to the cost of the long companies' intermediate (oil and gas) units. 30 FERC at 65,141. This proposal was put forward by the City of New Orleans before ALJ Head and the Commission. 31 FERC at 61,635 & n.6. It is not pressed on appeal.

[40] 30 FERC at 65,141. This proposal was put forward by the Louisiana Public Service Commission. It continues to press this position on appeal.

[41] 30 FERC at 65,141. This proposal was put forward by the Mississippi Public Service Commission. MPSC continues to press this position on appeal.

insisted that "generation additions in almost every instance (except for Grand Gulf) were made primarily to satisfy individual company needs." *Id.* at 65,168.[42]

ALJ Head, however, found that Grand Gulf constituted an "anomaly" in the MSU system:

> Grand Gulf from its inception was planned, presented to the licensing authorities and constructed as a system plant not only to serve the needs of MP&L but to serve the needs of all the operating companies on the system.

30 FERC at 65,170.[43]

He therefore deemed it appropriate to reject the System Agreement as filed and to allocate the costs of the Grand Gulf investment among all of the operating companies. Unlike ALJ Liebman, however, he held that this allocation should fluctuate from year to year to track each company's relative demand for the system's energy. 30 FERC at 65,172.

3. *FERC's initial decision.*[44] In Order No. 234 the Commission summarily affirmed both ALJs on the thresh-

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[42] Even ALJ Head conceded, however, that all of the operating companies would benefit from the economies of scale realized when an individual company built a plant providing more capacity than that company could absorb at the time. Moreover, he found that MSU was a "highly integrated system" which sought to achieve such economies of scale through "common planning." 30 FERC at 65,168.

[43] Specifically, ALJ Head was impressed by the following facts: (1) the Grand Gulf project was an amalgam of the nuclear units assigned to MP&L and NOPSI; (2) the plant was planned on the basis of the combined load forecasts of all of the operating companies; (3) it was clear all along that the facility would produce much more energy than MP&L could ever use; and (4) the Atomic Energy Commission approved the Grand Gulf license because the entire system had placed its credit behind MSE. 30 FERC at 65,170-71.

[44] FERC reviewed both ALJs' decisions in issuing Order No. 234, even though it had previously declined to consolidate

old issue of its own jurisdiction to amend the Sales Agreement and the System Agreement. 31 FERC at 61,643-46.[45] On the merits, the Commission affirmed both ALJs' findings that MSU constituted an "integrated electric system." 31 FERC at 61,645. The Commission, however, specifically rejected ALJ Head's finding that the MSU system displayed a "pattern of autonomy" with regard to the planning and construction of generating units. *Id.*

The Commission conceded that MSU's system of overlapping officers and directors and the representation of the operating companies on the System Operating Committee gave the operating companies substantial influence in the development of the system's plans. *Id.* at 61,646. FERC further observed that the individual companies used their influence to seek the addition of generating units that met their particular needs, and that Section 4.01 of the System Agreement made each operating company responsible for financing the ownership or purchase of the generating capacity necessary to service its customers. *Id.* at 61,649. The Commission nonetheless concluded that "major critical decisions, including decisions to build new generating units, are made by the Operating Committee for the benefit of the system as a whole." *Id.* at 61,646. *See also id.* at 61,650.

The Commission buttressed its conclusion with the following evidentiary support: (1) Section 4.01 of the 1982 System Agreement provides that the Operating Committee shall "determine" the system generation addition plans;[46] (2) at least five witnesses testified that new

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the two cases. *See* 21 FERC ¶ 63,039 (1982), *aff'd*, 22 FERC ¶ 63,015 (1983).

[45] The Commission rejected the jurisdiction arguments ALJ Head had considered in the System Agreement case, *see* note 37 *supra*, with the exception of the state certification challenge.

[46] The 1973 System Agreement had stated that the Operating Committee "assigns" responsibility for new generating

units were added to address the needs of the system as a whole, *id.* at 61,646-48; and (3) the Operating Committee minutes over a twenty-year period revealed that the Committee had the responsibility and the authority to make the "critical decisions" concerning the addition of generating capacity. *Id.* at 61,648-49.

The Commission's review of the Operating Committee minutes revealed that the Operating Committee did not merely rubber-stamp the requests of the individual operating companies concerning the addition of generating capacity. *Id.* at 61,649. The Commission found that the Operating Committee consistently based its generation plans on the needs of the system as a whole. *Id.* at 61,649-50. It found that the Operating Committee had authority over the general timing, location, and size of plant additions, while the individual operating companies retained authority to fill in the details of such fundamental decisions. *Id.* Thus FERC stated that there was no evidence in the record that an operating company had ever built a new plant without a recommendation from the Operating Committee or that one had ever refused to carry out such a recommendation. *Id.* at 61,651.[47]

In light of this finding, FERC rejected ALJ Head's contention that Grand Gulf was an "anomaly." Instead it agreed with ALJ Liebman that Grand Gulf, like every other generating station, was built to serve the needs of

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units to particular operating companies; the 1982 System Agreement does not use the word "assigns." Notwithstanding this change, the Commission found the 1982 Agreement to vest the same authority in the Operating Committee over allocation of responsibility for generating units as had existed in previous System Agreements. 31 FERC at 61,646.

[47] The Commission also noted that changes in the 1982 Agreement had enhanced the power of the Operating Committee to override the wishes of an individual operating company by providing for majority rule rather than a two-thirds vote. This provision made it impossible for a single company to block a Committee decision. 31 FERC at 61,651.

the system as a whole and to attain the system-wide goal of diversifying MSU's fuel mix. *Id.* at 61,653. MSE was deemed a mere financing shell that the Commission hypothesized would have been made available to any other operating company that suffered the financial difficulties encountered by MP&L. *Id.* at 61,654.

The Commission viewed the decision to move into nuclear power as a system-wide decision calculated to meet system-wide needs. It found that MSU's nuclear project had run afoul of unforeseen economic difficulties that had disrupted the system's historic rough equalization of generation costs. FERC therefore adopted ALJ Liebman's scheme [48] of allocating Grand Gulf costs so that each operating company would contribute proportionately to the system's investment in nuclear capacity. *Id.* at 61,655.[49]

4. *FERC's opinion on rehearing.* In Opinion No. 234-A FERC clarified its position on the various jurisdictional arguments it had addressed in its initial decision. 32 FERC at 61,943-52. The Commission also addressed—and rejected—the argument raised by various Arkansas parties that FERC lacked jurisdiction as there was no interstate sale of power. The Commission suggested that, whatever the merits of such an argument where a "monolithic" system is concerned, there was no question but that the transfer of power among the MSU operating companies constitutes a "sale for resale." *Id.* at 61,957.

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[48] The Commission declined to update the cost estimates for the Grand Gulf and Waterford 3 units, stating that both the cost and pertinent demand projections were constantly changing. 30 FERC at 61,657.

[49] In its initial decision the Commission did not expressly discuss the rationality of the alternatives to ALJ Liebman's approach presented in the record of ER-483. It implicitly addressed these concerns by adopting the ALJ's analysis. 31 FERC at 61,655.

Indeed, a major portion of the Commission's opinion on rehearing was dedicated to clarifying the Commission's essential finding concerning the "integrated" character of the MSU system. The Commission rejected any attempt to mischaracterize its decision as based on a view that MSU is a "monolith." *Id.* at 61,952. FERC simply insisted that, whatever the powers of the individual operating companies, the MSU Operating Committee makes the "*major* critical decisions on the System, *primarily* for the System as a whole." *Id.* at 61,953 (emphasis in original).[50] The Commission emphasized that its opinion hinged on "a variety of factors including the manner in which decisions are made by the commonly owned affiliates, and for whose primary benefit those decisions are made." *Id.* at 61,956.

Turning to the merits, the Commission addressed three challenges to the rationality of its allocation of Grand Gulf costs. It disputed the contention of the Arkansas parties that the allocation violated the spirit and practice of the MSU system, the System Agreement, and the intent of the parties to that Agreement. FERC responded that the clear intent of the System Agreement was to correct major cost imbalances while moving toward a mixed fuel base including nuclear and coal-fired facilities. The Commission insisted that it need not measure the rationality of its allocation from the vantage point of the parties at the time the UPSA was first negotiated. *Id.* at 61,957-59.

The Commission also addressed the argument of MP&L that the Commission's order had only exacerbated the

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[50] FERC also disputed AP&L's contention that at least on one occasion an operating company had refused to build a unit despite a "recommendation" by the Operating Committee that it do so. FERC noted that although it was true that LP&L had never built coal units in northern Louisiana in the early 1980's, there was no record evidence suggesting actual defiance of the Operating Committee. 32 FERC at 61,953-54.

discrimination it would have suffered under the original UPSA scheme. MP&L noted that under the UPSA it would have been responsible for 31.63% of Grand Gulf, but under the Commission's scheme it would be responsible for a full 33%. 31 FERC at 61,959. Under the new scheme Mississippi would receive only 9.5% of the system's nuclear capacity while paying for 15% of the system's nuclear investment. 32 FERC at 61,964 n.26.

The Commission responded by asserting that the mere fact that FERC's order increased MP&L's burden did not make it more discriminatory. It is completely rational, argued the Commission, that a smaller burden can be discriminatory and, with a change in the relative standing of the parties, a larger burden can be fair. The original allocation was discriminatory, in the Commission's view, because AP&L had failed to share the burden of Grand Gulf. Although the Commission's order would increase MP&L's allocation somewhat, it would spread the overall burden of Grand Gulf more equitably by making AP&L carry a portion of the burden.

The Commission suggested that its refusal to reallocate the capacity of all nuclear units (as well as their costs) was justified by the MSU system's historic aversion to equalizing all costs per kilowatt. *Id.* at 61,959. It stressed the same point in responding to the arguments of various Louisiana parties that it should have adopted full cost equalization. *Id.* at 61,961. Thus the Commission depicted its opinion as an attempt to balance

> the need to provide an equitable sharing of the investment costs of units that have (or could have) become unforeseeably high due to the unique problems associated with nuclear construction, and the need to recognize the efforts of individual companies on the System and allow them to retain the benefits of units they own to the fullest extent possible.

Id.

Dissatisfied with this rationale, petitioners sought review in this court.

II. JURISDICTION

The petitioners from Arkansas, Missouri and Mississippi raise certain threshold challenges to the Commission's decision. They contend that FERC lacks jurisdiction to modify the allocation of the capacity costs of Grand Gulf embodied in the Unit Power Sales Agreement ("UPSA"). We disagree, and hold that the Federal Power Act ("FPA" or "the Act")[51] provides FERC with authority to issue the orders in question. Initially, we will set forth the affirmative basis of FERC's jurisdiction; thereafter, we will address (and reject) each individual counterargument raised by petitioners.

A. *The Jurisdiction of the Commission*

Section 201 of the Act contains the Commission's basic jurisdictional grant.[52] It provides that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" and that "[t]he Commission shall have jurisdiction over all facilities for such transmission or sale . . . ." This section also defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter."[53] The facts here reveal that MSE sells Grand Gulf's energy to the affiliated operating companies of the MSU system at wholesale in interstate commerce. Thus, under section 201 of the Act, MSE is a "public utility" and FERC retains jurisdiction over its sales and facilities.

Sections 205 and 206 of the Act set forth the Commission's remedial authority. Section 205(a) establishes a

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[51] 16 U.S.C. §§ 824 *et seq.* (1982).

[52] *Id.* § 824. The states retain jurisdiction over retail rates.

[53] *Id.* § 824(e).

threshold requirement that all "rates and charges" made by a public utility, and "all rules and regulations affecting or pertaining to such rates and charges," must be "just and reasonable," or they will be deemed "unlawful." [54] Most significantly for our purposes, section 206 provides that when the Commission, after a hearing, determines that

> any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.*[55]

The combined force of these provisions leads inexorably to the conclusion that, under the circumstances presented in the instant case, FERC had jurisdiction to modify the Grand Gulf allocation set forth in the UPSA.

The distribution of Grand Gulf costs and capacity in the UPSA inevitably affects each operating company's generation costs and, by extension, their wholesale rates. When, as here, generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates. For this purpose, the UPSA cannot be examined in isolation. As the Commission stated, the UPSA is "an agreement which 'supple-

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[54] 16 U.S.C. § 824d(a) (1982). Section 205(b), 16 U.S.C. § 824d(b) (1982), further provides that no public utility shall, with respect to any jurisdictional sale, "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, . . . between localities . . . ."

[55] *Id.* § 824e(a) (emphasis supplied).

ments or supersedes' the coordination arrangements among the MSU utilities, and . . . is a contract 'affecting' rates under the 1982 System Agreement." [56]

The UPSA serves to distribute the Grand Gulf capacity available to MSE—and its cost—among the MSU operating companies. When the Commission acted to modify the UPSA and reallocate the capacity of Grand Gulf, it altered the relative amount of system capacity ultimately paid for by each affiliate. Concurrently, the 1982 System Agreement (Service Schedule MSS-1) established the terms of reserve capacity cost-sharing among the same group. Any change in the allocation of the capacity costs of Grand Gulf in the UPSA will change the relative "longness" or "shortness" of each company under the System Agreement, thus altering the equalization payments made and received for capacity under Service Schedule MSS-1. In the instant case, the cost burden of system generating capacity has been shifted among the affiliates, by virtue of Commission action and system agreement, in order to insure an equitable distribution.[57]

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[56] 32 FERC ¶ 61,425, at 61,949-50 (quoting 31 FERC ¶ 61,304, at 61,627 (1985) (Order on remand)).

[57] The Commission explained the effect of the intersection of the UPSA and the 1982 System Agreement as follows:

> The impact of these Grand Gulf allotments (or any other Grand Gulf allotments) on reserve equalization under Service Schedule MSS-1 of the 1982 System Agreement will likely be a change in the shortness or longness of each member. For example, when Grand Gulf 1 becomes commercially operable, to the extent that the fixed Grand Gulf allotment ratio exceeds (or is exceeded by) the monthly 1982 System Agreement responsibility ratio for a given pool member, that member will become either more long (or short) or less long (or short) for pool reserve equalization purposes. The excess capacity of the long members will be equalized in accordance with the 1982 Agreement, i.e., to the extent a member having excess capacity cannot reach voluntary agreements to sell its excess capacity and energy under Service Schedule

This equitable distribution is mandated by the FPA because of the historical integration of the MSU system.

Capacity costs are a large component of wholesale rates. Thus, the capacity costs of the system carried by each affiliate will significantly affect the wholesale price it pays for energy on the MSU system. In the Commission's view, the UPSA's allocation of Grand Gulf, combined with the provisions of the 1982 System Agreement, created serious inequities in the division of costs of power resources among the operating companies *in light of the integrated planning for generating capability on a system basis.* Unreasonable disparities in the shares borne by affiliates of the total costs of the system's generating capacity plainly "affect" the wholesale rates at which the operating companies exchange energy, and therefore require remedial action by the Commission pursuant to section 206.

A case involving the Northern States Power ("NSP") Companies, *State of Minnesota v. FERC*,[58] provides a helpful illustration of how agreements among affiliates can "affect" rates. The NSP Companies develop and operate both generation and transmission facilities on an integrated basis through participation in a Coordinating Agreement which, *inter alia*, establishes procedures for sharing costs on the system. In 1982, the Companies filed an amendment to that Agreement with FERC proposing a methodology for determining the rate of return on investment as a component of the fixed costs shared

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MSS-4 (Unit Power Purchase), its excess capacity will be equalized among the short members based on the costs of the long member's intermediate generating units under Service Schedule MSS-1 (Reserve Equalization). Any excess energy will be shared with the pool under Service Schedule MSS-3 (Exchange of Electric Energy Among the Companies).

31 FERC ¶ 61,305, at 61,656.

[58] 734 F.2d 1286 (8th Cir. 1984).

under that Agreement. The Minnesota Public Utilities Commission ("MPUC") intervened and contended that FERC lacked jurisdiction to review the amendment because the Coordinating Agreement does not establish a wholesale rate. Specifically, MPUC argued that FERC "exceeded its authority under the Federal Power Act and intruded upon retail ratemaking functions by accepting a filing that sets a rate of return on capital as part of a cost allocation agreement between affiliated power companies." [59]

The Eighth Circuit observed that "MPUC's challenge to the Commission's jurisdiction rests on its contention that the Coordinating Agreement serves simply as a mechanism for allocating costs among the NSP Companies and does not establish a wholesale rate for the resale of electricity." [60] However, the court agreed with the Commission that the Coordinating Agreement "contain[ed] numerous provisions authorizing the NSP Companies to exchange electric power among themselves in return for payment," *i.e.*, interstate wholesale transactions. Thus, the Eighth Circuit held that the Coordinating Agreement established a wholesale rate and that, "[b]ecause a change in the rate of return on investment affects the wholesale rate under the Coordinating Agreement, the Commission possessed jurisdiction to review and approve the proposed amendment." [61]

We are in total accord with the Eighth Circuit's view of FERC's jurisdiction as enunciated in *State of Minnesota*. In the instant case, the petitioners concede that wholesale rates are established in the disputed contracts governing the MSU system; but petitioners nonetheless contend that the Commission does not have jurisdiction here because other portions of these same agreements

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[59] *Id.* at 1287.

[60] *Id.* at 1288.

[61] *Id.* at 1289.

allocate generation costs among the MSU companies and these *particular* provisions do not themselves establish a wholesale rate. However, the petitioners ignore the critical point here that, while these provisions do not fix wholesale rates, their terms do directly and significantly *affect* the wholesale rates at which the operating companies exchange energy, due to the highly integrated nature of the MSU system. We conclude that, because the allocation of Grand Gulf capacity and costs, like the rate of return on capital in *State of Minnesota*, significantly *affects* the wholesale rates at which the operating companies exchange energy due to the combined effect of the UPSA and the 1982 System Agreement, that allocation is plainly within Commission jurisdiction.[62]

The Supreme Court quite recently confirmed the propriety of this analysis in *Nantahala Power & Light Co. v. Thornburg*.[63] In that case, FERC examined an agreement between two affiliated power companies, which allocated certain low-cost entitlement power between them.

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[62] In *South Dakota Public Utilities Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982), a case also involving the NSP Companies, an amendment to the Coordinating Agreement allocated costs arising from the cancellation of a system nuclear plant project in Wisconsin. The court upheld FERC's decision that the NSP Companies would share the cancellation costs on the basis of a pre-existing arrangement equalizing generating costs in the Coordinating Agreement and quoted with approval the following language from the FERC order:

> The Amendment to the Coordinating Agreement of Northern States Power Company (Minnesota) and Northern Power Company (Wisconsin) filed with the Commission . . . is just and reasonable. It is approved as a rate schedule change pursuant to § 205 of the Federal Power Act subject to the modification ordered in Paragraph (B) below.

Id. at 677. It is noteworthy that no question was raised as to the Commission's jurisdiction to review this amendment to the Coordinating Agreement.

[63] 54 U.S.L.W. 4676 (U.S. June 17, 1986).

FERC found that the agreement was unfair to one of the companies, Nantahala, and increased the percentage of low-cost entitlement power that it should receive. Although FERC did not specifically "reform" the agreement, Nantahala was required to file revised rates, reflecting its increased entitlement to low-cost power. The North Carolina Utilities Commission ("NCUC") not only rejected the actual apportionment agreed to by the companies, but also "employed an allocation of entitlement power that nowhere [took] into account FERC's allocation of that same power." [64]

The Supreme Court held that the NCUC orders were inconsistent with preemptive federal law. The Court observed that

> [a]lthough the [companies' agreements] do not purport explicitly to set a sales price for power, FERC's decision on how Nantahala may treat these agreements in determining its wholesale rates obviously does affect Nantahala's costs directly, and thus Nantahala's wholesale rates.[65]

FERC's allocation of Grand Gulf's costs and capacity, like the setting of entitlement percentages in *Nantahala Power & Light*, does not set a sales price, but does directly affect costs and, consequently, wholesale rates. We cannot disregard the Supreme Court's clear and timely message that FERC's jurisdiction under such circumstances is unquestionable.

Having determined that all MSU generating capacity, including Grand Gulf, had been built and planned on an integrated basis by the MSU system to meet its collective needs and that the allocation of Grand Gulf would affect wholesale rates within the system, the Commission decided that the affiliated operating companies' arrange-

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[64] *Id.* at 4678.

[65] *Id.* at 4681.

ment for sharing of capacity costs—as set forth in the UPSA and the 1982 System Agreement—was unjust, unreasonable and unduly discriminatory. Under these circumstances, sections 205 and 206 of the FPA plainly provide FERC with authority to modify the Grand Gulf allocation agreed to by the operating companies.

B. *Arguments Opposing Jurisdiction*

The petitioners advance various theories to support their contention that FERC lacks jurisdiction to impose the remedy selected in this case. They maintain that: (1) FERC has unlawfully exercised jurisdiction over a generating facility; (2) FERC has unlawfully compelled a purchase of power and generating capacity; (3) FERC has impermissibly intruded on areas subject to state jurisdiction; (4) FERC has contravened the purposes of the Public Utility Holding Company Act ("PUHCA") and infringed upon the authority of the Securities and Exchange Commission ("SEC"); and (5) FERC has violated the *Mobile-Sierra* doctrine. As set forth below, none of these attempts to displace FERC's jurisdiction succeed.

1. *Jurisdiction Over Generating Facilities*

The Arkansas-Missouri petitioners contend that, in allocating the cost and capacity of Grand Gulf, the Commission has asserted jurisdiction over a generating facility in contravention of section 201(b) of the FPA. They maintain that the equalization of nuclear investment by reallocating generation costs falls outside of FERC's rate making jurisdiction and instead falls solely within state authority over generation.

In pertinent part, the statute states:

> The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as spe-*

> *cifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy. . . .[66]

In the same section, the statute provides for

> *Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III . . . .*[67]

The Conference Report on the FPA instructs that the italicized phrases were "added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation . . . of electric energy to the extent provided in other sections . . ."[68] The Commission concluded that, in the course of exercising its undisputed jurisdiction over interstate sales of electric energy at wholesale, it lawfully could reallocate the costs of Grand Gulf across the integrated system. Hence, the Commission reasoned that although allocating cost does, to some extent, result in the "regulation of matters relating to generation," such regulation is valid under the FPA when it is the byproduct of a legitimate exercise of FERC's power to regulate wholesale rates.

We agree that FERC has not exercised jurisdiction over generating facilities in any way that violates the FPA. Instead, the Commission is acting pursuant to its exclusive rate authority over wholesale transactions and its remedial authority as set forth in sections 205 and 206.

The Arkansas-Missouri petitioners concede that FERC has jurisdiction to modify the rates and rate-related terms of the UPSA, but deny that this authority encompasses the reallocation of generating capacity. Citing the congressional concern that states maintain control of gen-

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[66] 16 U.S.C. § 824(b) (1982) (emphasis supplied).

[67] *Id.* (emphasis supplied).

[68] H.R. REP. No. 1903, 74th Cong., 1st Sess. 74 (1935).

erating facilities,[69] they assert that the statutory prohibition of federal regulation of such facilities in section 201 (b) becomes meaningless if FERC is permitted to allocate the costs of a plant.

This analysis is flawed. As FERC correctly reasoned:

> We cannot interpret the "but" clause of Section 201 (b) (1) as nullifying the authority granted to us in the first sentence of Section 201(b) (1), in situations where generation facilities are used for interstate wholesale sales. To interpret the statute otherwise would be inconsistent with the declaration in Section 201(a) that Federal regulation of the sale of energy at wholesale in interstate commerce is necessary in the public interest.[70]

Nor could such an interpretation be reconciled with the Commission's statutory authority to revise contracts affecting rates which are unjust, unreasonable or unduly discriminatory.[71]

The petitioners' general assertion that FERC has improperly infringed upon a state realm by reallocating the costs of Grand Gulf will be dealt with separately *infra*; for the present purpose, it suffices to note that FERC has not regulated a facility, but rather the wholesale rates of interstate sales within the MSU system. It is well-accepted that FERC must allow the recovery of the cost of generating facilities in setting wholesale rates. Here, FERC has simply exercised its undisputed authority over the wholesale rates of electric generating facilities in interstate commerce, which includes, under the facts presented, the authority to reallocate the costs of Grand Gulf across the system. As the statute quite plainly states, FERC's control here is exclusive. The jurisdictional line

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[69] *See* § 201(b) (1) of the FPA, 16 U.S.C. § 284 (1982).

[70] 32 FERC ¶ 61,425, at 61,947.

[71] *See* 26 FERC ¶ 63,044, at 65,113-14.

drawn by Congress is bright, and FERC stands on the correct side of that line.

The cases cited by the Arkansas-Missouri petitioners are inapposite. In *Connecticut Light & Power Co. v. FPC*,[72] the Supreme Court construed the "local distribution" exception to the Commission's jurisdiction, rather than the "generating facilities" exception, in the context of determining whether to permit regulation of an electric utility located and serving customers exclusively in the state of Connecticut. In its decision, the Court cited the language of section 201(a) of the FPA, "but shall not have jurisdiction . . . over facilities used in local distribution." The lower court had decided that this exemption did not preclude Commission regulation if the Act otherwise provided for the facilities' regulation, *i.e.*, if they carried energy in interstate commerce. The Supreme Court rejected this interpretation of the "but" clause and held that, in order to be subject to FERC jurisdiction, a company must own facilities used in the transmission of interstate power *and not be* a local distribution facility. From this, the petitioners reason that Grand Gulf must be used for interstate wholesale sales *and not be* a generating facility to be subject to FERC jurisdiction.

This interpretation must fail. Initially, we note that the distribution facility at issue in *Connecticut Light & Power* sold energy exclusively within Connecticut; MSE's sales are, without exception, at wholesale and in interstate commerce. Second, the holding in *Connecticut Light & Power* addresses only the "local distribution" exception to the FPA, not the "generating facilities" exception at issue here. Furthermore, the Court's limited discussion of the "generating facilities" exception refutes petitioners' contention. In this discussion, the Court accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for

[72] 324 U.S. 515 (1945).

interstate wholesale sales.[73] In the instant case, the MSE generating facilities are utilized solely for interstate wholesale sales, thus satisfying the Court's test.[74]

2. *Compelled Purchases of Power and Capacity*

The Arkansas-Missouri petitioners also argue that FERC has exceeded its jurisdiction by forcing independent companies—AP&L, for example—to purchase power from Grand Gulf in quantities beyond that agreed to in the UPSA. The Commission found that, as a factual matter, there would be no "forced purchase" due to the integrated nature of the Grand Gulf project and the MSU system and AP&L's individual longstanding, in-depth commitment to Grand Gulf. We agree with the Commission that "the issue here is not whether a company should be forced to purchase or sell power, but rather is the

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[73] 324 U.S. at 528 n.6. (The Court rejected the holding of a previous circuit decision in *Hartford Electric Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), but cited with approval the alternative rationale for that decision.)

[74] The Arkansas-Missouri petitioners also cite cases prohibiting FERC from ordering the wheeling of power, *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978), or the modification of retail rates, *FPC v. Conway Corp.*, 426 U.S. 271, 276-77 (1976). They maintain that these cases demonstrate that even where the FPA grants power—such as the power over interstate wholesale sales of electric energy—"that grant must be reconciled with [the Act's] limitations on power, such as . . . the lack of jurisdiction over generating facilities." Arkansas Public Service Commission ("APSC") Brief at 28. These cases are inapposite here because, under the clear terms of the statute, the Commission has been awarded jurisdiction over generating facilities "to the extent provided in other sections," including jurisdiction necessary to effectuate regulation of interstate wholesale rates.

appropriate allocation of costs among integrated companies owned by the same parent." [75] The Commission has made detailed findings on the highly integrated nature of the MSU system and on the coordinated planning of the Grand Gulf project. The depth of the operating companies' historical involvement in both the system and the project allows the Commission to step in and reallocate costs under section 206(a) of the FPA so that each of the operating companies is treated fairly.

A consistent line of judicial precedent supports FERC's authority to approve and/or modify the terms of the pooling and coordination agreements of closely integrated power systems when it deems those arrangements unlawful as filed. Over thirty years ago, in *Pennsylvania Water & Power Co. v. FPC*,[76] the Supreme Court considered the Commission's authority to order continued integrated operations by two utilities. For more than 20 years, the companies had been interconnected and had bought and sold power in a coordinated fashion. The FPC ordered a significant reduction in the rates charged by one utility to the other, and the selling utility refused to comply. As a result, the Commission itself prescribed rate schedules to comply with its rate order, requiring the utility to "continue to *buy*, sell, and transmit power in the same coordinated manner" as in the past, though at the decreased rates. The utility objected, but the Supreme Court sustained the order, observing that the integration of utilities is a "practice" within the meaning of section 206 and that the Commission could order its

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[75] 31 FERC ¶ 61,305, at 61,643. The Commission suggests upon reconsideration that its authority is unchanged whether "the central issue is viewed as one of cost allocation or as 'forced' purchases." 32 FERC ¶ 61,425, at 61,949. We do not interpret this comment as an assertion by FERC that it may, under any circumstances, force a purchase among nonaffiliates.

[76] 343 U.S. 414 (1952). *See also* discussion of *Nantahala Power & Light*, *supra* text at notes 63-65.

continuation and determine contract terms suitable to achieve that end:

> The Act gives the Commission ample statutory power to order Penn Water and Consolidated to continue their long-existing operational "practice" of integrating their power output. . . . In ordering such "practice" continued, the Commission was furthering the expressly declared policy of [section 206 of] the Act.[77]

This case provides a solid foundation for the Commission's authority to order a purchase or sale of power when, as here, such an order is consistent with the historical integration of a power pool or network.

This conclusion is further confirmed by the decision of this circuit in *Central Iowa Power Cooperative v. FERC.*[78] In that case, FERC approved a voluntary pooling agreement among some 31 electric systems. The petitioners therein complained that the agreement failed to provide services offered by pooling arrangements established among other electric systems. Because of the voluntary nature of pooling arrangements under section 202(a) of the FPA, the court held that FERC could not order an expansion of pool services merely upon a showing "that a particular pool does not offer the same range of services as another pool."[79] The court, however, went on to determine that FERC did have "specific responsibility in this proceeding to decide whether a particular voluntary pool agreement was unjust, unreasonable, or unduly dis-

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[77] *Id.* at 422-23. The Court specifically noted that the Commission's order was based on authority derived from section 206 of the FPA, and not from the underlying contract between the parties. *Id.* at 422.

[78] 606 F.2d 1156 (D.C. Cir. 1979).

[79] *Id.* at 1167 (quoting with approval the Decision of the Commission).

criminatory," [80] and, in the event of such a finding, that FERC had authority to order expanded services:

> The Commission had authority . . . under section 206 of the Act . . . *to order changes in the limited scope of the Agreement, including the addition of pool services*, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract [that was] unjust, unreasonable, unduly discriminatory or preferential." [81]

Having found that the agency may exercise authority under section 206 to modify an unlawful voluntary power pool arrangement negotiated by nonaffiliates, *a fortiori* we must conclude that FERC may intervene to reform an unlawful agreement made by affiliates in a fully integrated, commonly owned system.

The cases relied upon by the Arkansas-Missouri petitioners are easily distinguishable. In *Southern Co. Services, Inc.*,[82] Southern Company filed a contract with the Commission to increase sales to Florida Power & Light ("FP&L"). Seminole Electric Cooperative intervened in the proceeding and argued that FP&L should be required to purchase energy from it. Seminole was a stranger to the UPSA at issue in *Southern*, was not affiliated with either Southern or FP&L, and did not contend Southern's rates were unjust or unreasonable under the FPA. Given the entirely inapposite factual setting of *Southern*, FERC's refusal to reject the Southern-FP&L contract or to order FP&L to purchase power from Seminole is irrelevant to the present case.

The Arkansas-Missouri petitioners also maintain that *Otter Tail Power Co. v. FPC*,[83] establishes that compul-

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[80] *Id.* at 1167 n.33.

[81] *Id.* at 1168 (emphasis supplied).

[82] 20 FERC ¶ 61,332 (1982).

[83] 473 F.2d 1253 (8th Cir. 1973).

sory purchases of power may be characterized as a compelled expansion of generating facilities, forbidden by section 202(b) of the Act. In that case, FERC ordered a utility to interconnect with a municipality and to assume the costs of the municipality's generating plant in exchange for energy from the plant. The court determined that this transaction forced the utility to assume beneficial ownership of the plant, *i.e.*, to enlarge its facilities. In the present case, FERC has ordered the operating companies to pay a certain percentage of the capacity costs of Grand Gulf—an entity constructed for system benefit and already within the beneficial ownership of the parent holding company, MSU. The Commission decision does not add any capacity to the MSU system. Nor does it modify the percentage of generating capability for which each company will ultimately bear responsibility under the 1982 System Agreement; it simply alters the composition of each individual company's share.

In relying on *Otter Tail Power*, the parties once again seek to ignore AP&L's role as an affiliated company in an historically integrated system and Grand Gulf's status as a system project. In the factual context of the instant case, the reallocation of capacity costs among the parties cannot be described as a compelled purchase of either power or additional generating facilities.

3. *Intrusion on State Jurisdiction*

The Arkansas-Missouri petitioners and the Mississippi Public Service Commission ("MPSC") separately contend that FERC's orders unlawfully interfere with the jurisdiction of the state regulatory authorities. We will treat the arguments individually.

a. *The Arkansas-Missouri Argument*

Section 201(a) of the FPA provides that FERC's regulation of interstate wholesale sales of electricity extends "only to those matters which are not subject to regulation

by the States." The petitioners assert that the FERC orders interfere with local authority over matters intended to be within the province of state regulators. They reason that FERC's cost allocation has such an extensive impact on the rate base in the state jurisdictions that it, in effect, removes regulation of retail rates and capacity construction from the hands of the state commissions. These assertions are unfounded. FERC has exercised its jurisdiction in order to regulate the sale of electricity at wholesale in interstate commerce in the context of exchanges within a multi-state power pool, an area exclusively subject to FERC control. The fact that FERC's assertion of jurisdiction has some impact on state regulation does not make it unlawful.

As the Supreme Court made clear in *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*,[84] the states are constitutionally prohibited from exercising jurisdiction over wholesale rates for electricity transmitted and sold in interstate commerce. In the absence of federal action, this holding created a regulatory gap, and Congress enacted Title II of the FPA to fill that gap and provide for federal authority over interstate wholesale rates:

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary . . . case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.[85]

This holding was confirmed in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Develop-*

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[84] 273 U.S. 83 (1927).

[85] *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964).

ment Comm'n,[86] in which the Supreme Court observed that states have retained "their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns" "[w]ith the exception of the broad authority of the . . . Federal Energy Regulatory Commission over the need for and pricing of electrical power transmitted in interstate commerce . . . ." [87]

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[86] 461 U.S. 190 (1983).

[87] *Id.* at 205-06. The Arkansas parties accuse FERC of contravening the Supreme Court's decision in *Arkansas Electric Cooperative Corp. v. APSC*, 461 U.S. 375 (1983). In that case, the Court upheld state jurisdiction over the wholesale rates of a rural power cooperative, in part because the FPC had previously determined that it lacked jurisdiction to regulate these entities which fall under the supervision of the Rural Electrification Administration. The Court, therefore, rejected the old "bright line" between state and federal jurisdiction, *i.e.*, the distinction drawn between regulation of retail or wholesale rates under the commerce clause. Simultaneously, however, the Court emphasized that a new "bright line" between state and federal jurisdiction had been drawn by Congress in the FPA. We hold that the Commission's actions fall within a domain assigned to federal control by the FPA.

Petitioner Arkansas Industries accuses FERC of concluding that federal and state jurisdictions are overlapping and of performing a balancing of the relevant federal and state interests under the commerce clause—a course of action eschewed by the "bright line" test as articulated in *Arkansas Electric*—in its decision to allocate Grand Gulf. As detailed above, we have decided that FERC's allocation of Grand Gulf costs is within its exclusive authority over wholesale rates in interstate commerce under the FPA. The Commission's explicit sensitivity to state concerns in determining the extent to which it would exercise its authority to remedy the unlawfulness of the UPSA is not equivalent to an inquiry under the commerce clause to determine whether a state may regulate in this realm.

As explained above, there is no clash between state and federal jurisdiction in the instant case. FERC's allocation of Grand Gulf was simply an exercise of its authority to regulate wholesale rates in interstate commerce—an area within its exclusive jurisdiction.

The Arkansas-Missouri petitioners contend that the FERC orders deprive state commissions of their control over retail rates. The Supreme Court has recently confirmed that

> [o]nce FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must rather give effect to Congress's desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.[88]

Thus, once FERC permits a utility to charge a rate reflecting investment in a particular plant, a state commission may be obliged to reflect such an investment in the retail rate base. Under these circumstances, the petitioners argue, state regulatory authorities confronted with a FERC cost allocation will virtually lose control over retail rates.

In *Nantahala Power & Light*, the Supreme Court made clear that, in setting wholesale rates, the NCUC was required to give binding effect to the interstate wholesale rate that had been fixed by FERC. The Court further determined that the realm of preemption was "not limited to 'rates' *per se*" and stated:

> Here FERC's decision directly affects Nantahala's wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation. FERC's allocation of entitle-

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[88] *Nantahala Power & Light Co. v. Thornburg*, 54 U.S.L.W. at 4680.

> ment power is therefore presumptively entitled to more than the negligible weight given it by NCUC.[89]

Similarly, in the present case, the Commission's allocation of Grand Gulf's costs and capacity affects wholesale rates and, therefore, the state commissions may not "interfere" with FERC's "plenary authority."

Moreover, the petitioners' argument would apply to the costs embodied in any wholesale rate approved by FERC and, therefore, proves too much. In any wholesale rate proceeding, the state commissions may protect their interests, as here, by intervening and presenting evidence before the Commission, a neutral body. The main point here is that FERC plainly had authority to approve or reject the cost allocation pursuant to its jurisdiction over wholesale interstate rates despite its inevitable impact on retail rates.[90]

Moreover, when, as here, affiliated operating companies in an integrated regional system enter into agreements for wholesale power sales in interstate commerce which allocate costs, FERC jurisdiction has additional merits. As ALJ Head observed, "the Commission is perhaps in the best position to reach the most equitable result and to act in the public interest, rather than to be controlled by the necessarily parochial concerns of the States."[91] The basis of this conclusion has been discussed by FERC in another context:

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[89] *Id.*

[90] In *Northern States Power Co. v. Minnesota Public Utilities Comm'n*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S. Ct. 3546 (1984), and *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981), two state supreme courts determined that their respective state regulatory commissions had to accept and collect the allocated costs of an abandoned nuclear plant project in the retail rates charged for NSP Company power. We endorse the state courts' conclusion that FERC had authority to approve or reject the cost allocation.

[91] 30 FERC ¶ 63,030, at 65,151.

> If State Commission A orders a change to be made in a wholesale rate filing, presumably because it would benefit the ratepayers in State A, then State Commission B might well retaliate by ordering a counter rate filing that would benefit the ratepayers in State B. . . . It was to protect against such competing local state interests that a Federal Commission was given jurisdiction to protect the national interest in transmission and sales for resale in interstate commerce.[92]

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[92] *Western Massachusetts Electric Co.*, 23 FERC ¶ 61,025, at 61,064 (1983). Most recently, the Eighth Circuit spoke to a similar question in the same factual context involved in the instant case. In *Middle South Energy, Inc. v. APSC*, 593 F. Supp. 363 (E.D. Ark. 1984), *aff'd*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986), the APSC sought to require AP&L to show cause why the UPSA and the other Grand Gulf allocation agreements were not void *ab initio* because the utility had failed to obtain the APSC's prior approval. The district court enjoined the inquiry, holding that it constituted a collateral challenge to the FERC proceedings and an intrusion into a preempted area. On appeal, the Eighth Circuit affirmed, but rested its decision on an alternative finding that APSC's inquiry was an unwarranted burden on interstate commerce. The Eighth Circuit's characterization of APSC's purpose is instructive and highlights the merit of federal regulation in the present case:

> The APSC seeks to cancel the Grand Gulf agreements ostensibly because they have not received the necessary state regulatory approval. Its apparent concern, which has been made abundantly plain in its orders and its arguments before the SEC and FERC, however, is the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf. It seeks to deflect what it has estimated to be rate increases of more than $3.5 billion over the next ten years. Given free rein, the APSC would shift this burden to the citizens of Mississippi and Louisiana, citizens who are powerless to directly influence Arkansas' internal affairs.

772 F.2d at 416-17 (footnote omitted).

This same reasoning applies with equal force to a cost allocation among affiliates who exchange power at wholesale in interstate commerce.[93]

b. *The Mississippi Argument*

The MPSC argues that the Commission's orders unlawfully disregard the considerations upon which that state agency relied in certificating construction of Grand Gulf in Mississippi. We find the Commission's analysis and rejection of this argument entirely correct.

MPSC asserts that the utilization of any allocation procedure other than that accepted by it in the Grand Gulf certification proceedings would impermissibly usurp its certification authority. As the Commission found, this assertion is incorrect for several reasons. First, as has been detailed above, state regulatory authorities, in-

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[93] The Arkansas-Missouri petitioners further maintain that FERC's orders usurp state jurisdiction by imposing costs on AP&L for capacity it does not need. This argument appears ludicrous in light of the integrated planning and construction of generating capacity on a system-wide basis. Moreover, none of the operating companies seek Grand Gulf capacity at the present time.

Equally fallacious is the APSC's argument that FERC's orders have unlawfully "remove[d] low cost facilities from AP&L by forcing a sale from those facilities to consumers in Louisiana and Mississippi." APSC Brief at 41. The reallocation of Grand Gulf simply adjusts AP&L's share of MSU's generation capacity costs—costs incurred jointly by the system.

APSC also asserts that it issued certifications for Arkansas' nuclear and coal plants based upon its perception of the needs of AP&L's customers and that it carefully supervised construction of these plants to insure low costs. Hence, the state regulatory authority contends that it would be unfair to impose upon Arkansas generating capacity not subject to similar prior scrutiny. This argument, too, fails; AP&L's supporters are not free to ignore the historical integration of the MSU system and AP&L's continuous involvement and responsibility in planning generation capacity for that system.

cluding the MPSC, do not have authority, as a threshold matter, to approve any allocation of Grand Gulf's cost or capacity among the system operating companies. Such decisions were subject to review and approval by the Commission.

Moreover, the MPSC argument, which it quite properly characterizes as one of equitable estoppel, is untenable under the circumstances. As FERC correctly observed, the Commission itself made no representations to the MPSC; its hands could not be tied by the doctrine, particularly here where its application would lead to "an inequitable result." [94]

Finally, it is noteworthy that the MPSC "did not specifically approve any particular allocation or allocation methodology for Grand Gulf or establish any particular allocation or allocation methodology as a condition of the certificate." [95] This factual prerequisite to the application of the doctrine of equitable estoppel, too, is absent.

For all of these reasons, the MPSC's arguments were properly rejected by FERC.

4. *Intrusion on the SEC's Jurisdiction*

The Arkansas-Missouri petitioners contend that FERC has impermissibly infringed upon the authority of the SEC to regulate the MSU system as a registered holding company under the PUHCA.[96] They further maintain that, by statutory mandate, any conflict between the SEC's authority under the PUHCA and FERC's authority under the FPA must be resolved in favor of the

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[94] 30 FERC ¶ 63,030, at 65,166, *cited in* 31 FERC ¶ 61,305, at 61,645.

[95] 26 FERC ¶ 63,044, at 65,111-12. *See also* 30 FERC ¶ 63,030, at 65,166, *cited in* 31 FERC ¶ 61,305, at 61,645.

[96] 15 U.S.C. §§ 79 *et seq.* (1982).

former.[97] We find no inconsistency in the actions taken by FERC and the jurisdiction of the SEC.

The SEC has correctly explained the division of responsibility between itself and FERC:

> The jurisdiction of this Commission [the SEC] with respect to the availability agreement existed under Section 12(b) of the Act as to the indemnity obligations of the four operating companies to MSE and as to the indemnity that three of the companies gave to APL. *The contracts for the sale of electric energy among the subsidiaries of MSE [sic] are subject to the exclusive jurisdiction of FERC.* Generally a contract for sale of goods and services to an associate company is governed by Section 13(b) of the Act, but Section 2(a)(20), which defines "Sales contract," expressly excludes sale of "electric energy or natural or manufactured gas." [98]

The SEC thus explicitly acknowledged FERC's control over wholesale rates and sales among the operating companies and its statutory authority over the rates and rate-related terms of the UPSA.[99] Moreover, when the

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[97] *See* 16 U.S.C. § 825q (1982).

[98] *In the Matter of Middle South Utilities, Inc., Middle South Energy, Inc.*, SEC PUHCA Release No. 23,579, 32 SEC Docket 416, 419 n.15 (Jan. 23, 1985) (Memorandum Opinion and Order Authorizing Common Stock Sale and Acquisition and Denying Request for Hearing) (emphasis supplied).

[99] The SEC has also observed that

> [t]he operating subsidiaries in the Middle South system have been an integrated system since 1930. As an integrated system, the operating companies have been parties to a series of system agreements governing intercompany sales of electric energy, as well as the planning, construction and operation of generation and transmission facilities. *These agreements are regulated by [FERC] under the Federal Power Act.*

Id. at 417-18 (footnote omitted) (emphasis supplied).

SEC approved the Reallocation Agreement among the system operating companies,[100] it recognized that a rate schedule for the sale of energy would be filed with FERC —a schedule plainly subject to modification pursuant to FERC's authority under the FPA. The SEC itself perceives no conflict between its jurisdiction and that of FERC. Similarly, having determined that the allocation of Grand Gulf is well within FERC's authority over wholesale rates for electric energy in interstate commerce, we, too, have little trouble concluding that there is no conflict with SEC jurisdiction.

Nor do we find merit in the claim that FERC's action is at odds with the goals of the PUHCA. We agree that an important aim of the PUHCA was the elimination of control of some holding companies so that local utilities might be regulated by local authorities. However, the PUHCA itself permits holding companies to own subsidiary utilities when its purposes are best served by focusing on regional rather than state interests, so long as the effectiveness of regulation is not impeded.[101] The PUHCA permits the continued existence of a holding company if its operations are limited "to a single integrated public-utility system," [102] which is defined as follows:

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not

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[100] *Middle South Energy, Inc.*, SEC PUHCA Release No. 22,280 (Nov. 18, 1981).

[101] *See* 15 U.S.C. § 79k(b) (1982).

[102] *Id.*

> so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation . . . .[103]

The SEC has determined that the MSU system constitutes an "integrated public-utility system." [104] Thus, the regional integration embodied in the structure of the MSU system was clearly contemplated by Congress when it enacted the PUHCA.

Moreover, in the PUHCA itself, Congress recognized "that affiliate power transactions 'are not susceptible of effective control by any State.' " [105] Transactions, such as this one, between affiliated power companies appear to be precisely the type of transactions that Congress sought to regulate by enactment of the Federal Power Act and the Public Utility Holding Company Act of 1935." [106]

5. *The Mobile-Sierra Doctrine*

The APSC maintains that FERC's orders disregard the *Mobile-Sierra* doctrine,[107] which requires the Commission to respect certain private contract rights in exercising its regulatory powers. We find that, in the instant case, this doctrine does not bar the exercise of FERC's power under section 206 of the FPA to reform

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[103] *Id.* § 79b(a) (29).

[104] *Middle South Utilities, Inc.*, 35 S.E.C. 1, 10 (1953).

[105] *State of Minnesota*, 344 N.W.2d at 382 n.17 (quoting 15 U.S.C. § 79a(a) (1982)).

[106] *Id.*

[107] This doctrine is based on the companion cases of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

a practice or contract affecting a rate charged by a public utility for wholesale service in interstate commerce.

In *the Mobile case*, the Mobile Gas Service Corporation ("Mobile"), a natural gas distributor, had entered into a long-term contract with the United Gas Pipe Line Company ("United") to purchase gas for resale to an industrial customer, Ideal Cement Company ("Ideal"). Ideal had a reciprocal contract to buy the gas from Mobile. The Mobile-United agreement had been filed with the Commission and was part of United's filed schedule of rates. Subsequently, United, acting without the consent of Mobile, altered the rates specified in its contract with Mobile by filing with the Commission a new rate schedule purporting to increase the rate on gas sold to Mobile for resale to Ideal. Mobile challenged United's action, and the Supreme Court held that the Natural Gas Act does not permit natural gas companies to change their rate contracts by unilateral action.

Thereafter, in *Sierra*, the Court applied its holding in *Mobile* to cases arising under the FPA. Thus, neither the filing of a new rate nor a finding that it is reasonable may abrogate a utility's contract with a distributor. "Together, the two cases make it crystal clear that a heavy burden must be met before a customer who has negotiated a fixed-price contract can be deprived against his will of the benefits of his bargain." [108]

APSC suggests that, in reforming the UPSA, FERC has snatched from AP&L the favorable result of its contractual escape from responsibility for Grand Gulf in contravention of the *Mobile-Sierra* holdings. We disagree. Initially, we note that the UPSA itself expressly permits unilateral changes in the contract by MSE:

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[108] *Town of Norwood v. FERC*, 587 F.2d 1306, 1310 (D.C. Cir. 1978).

> Nothing contained herein shall be construed as affecting in any way the right of MSE to unilaterally make application to FERC for a change in the rates contained herein or any other term or condition of this Agreement under Section 205 of the Federal Power Act and pursuant to FERC Rules and Regulations promulgated thereunder.[109]

Moreover, the UPSA makes no mention of any restriction on the Commission's authority to reform agreements under section 205 or section 206 of the FPA.[110] This circuit has made it clear that parties may agree to unilateral rate filings[111] and that parties may agree to "leave unaffected" the Commission's power to replace rates, and terms affecting rates, that are either contrary to the public interest or unjust, unreasonable, unduly discriminatory or preferential to the detriment of the contracting parties.[112] The signatories to the UPSA elected to

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[109] 616-R. 2982, I J.A. 246.

[110] In fact, the record suggests that the parties contemplated FERC review of the terms of the UPSA. *See* Reallocation Agreement, July 28, 1981. 616-R. 3275, I J.A. 268 ("2. An agreement between LP&L, MSE, MP&L and NOPSI will be executed in form for filing with the Federal Energy Regulatory Commission in accordance with Part 35 of the Commission's Regulations establishing the terms, conditions and rates for the sale of capacity and energy from MSE to LP&L, MP&L and NOPSI. . . . 7. The effectiveness of this Agreement is subject to the receipt of all necessary regulatory approvals.").

[111] *See Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984); *Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983).

[112] *Papago Tribal Utility Authority*, 723 F.2d at 953. The APSC incorrectly suggests the Supreme Court's holding in *Sierra* made the public interest standard the sole criteria for contract revision in section 205 or section 206 proceedings.

permit unilateral rate filings and not to restrict the Commission's power.[113] The parties' bargain itself contemplates the Commission's review, and potential reform of their agreement; the *Mobile-Sierra* doctrine requires no more.[114]

Finally, even if the contracts fall within the scope of the *Mobile-Sierra* decisions, the Supreme Court has emphasized that the relevant agency, here FERC, may always reform a contract found to be "unlawful" or "contrary to the public interest," *i.e.*, that "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest."[115] The Court stated in *Sierra* that the Commission "has undoubted power under § 206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful"[116] and indicated three circumstances under which the Commission might conclude that a rate or a contract term affecting a rate could be found

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In fact, as this court has made clear, either the interest of the public *or* the interest of the parties in nondiscriminatory rates will suffice to justify the *Commission's* decision to reform rates, *id.* at 954 n.5, so long as the parties' contract does not eliminate the Commission's authority over discrimination or preference that operates only against the signatories. Such discrimination may be waived "up to the point where it produces some independent harm to the public interest," *id.* at 953 n.4, but no such waiver took place in the instant case.

[113] "[C]ourts and the Commission have almost universally construed contractual references to future rate changes to authorize § 206 proceedings with a just-and-reasonable standard of proof." *Kansas Cities*, 723 F.2d at 88.

[114] *See Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir.) (describing the *Mobile-Sierra* doctrine as "refreshingly simple: . . . Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid."), *cert. denied*, 414 U.S. 1068 (1973).

[115] *Mobile*, 350 U.S. at 314.

[116] *Sierra*, 350 U.S. at 353.

contrary to the public interest and therefore subject to revision: "where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." [117] Here FERC expressly adopted the findings of ALJ Liebman who found the level of discrimination in the UPSA "profound" and agreed that its impact on customers in Louisiana and Mississippi would be "dramatic[]." [118] The Commission's specific determination of unlawfulness provides the "unequivocal public necessity" [119] for reformation of the UPSA under section 206 of the FPA.

For each of the foregoing reasons, the *Mobile-Sierra* doctrine does not preclude FERC's actions in the instant case.

C. *Conclusion*

For all of the foregoing reasons, we reject petitioners' principal contentions with respect to FERC's jurisdiction. We have also considered all other arguments suggesting that the Commission is without jurisdiction in this case, and we find them to be without merit. The Federal Power Act clearly provides FERC with authority to issue the orders here in question. We now turn to the merits of this case.

III. Merits

Petitioners challenge FERC's decision to reject the Unit Power Sales Agreement and to equalize nuclear capacity among the MSU operating companies. In the process, many advocate adoption of a particular, alternate allocation. We reject these challenges because we conclude that FERC's action was both rational and within

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[117] *Id.* at 355.

[118] 26 FERC ¶ 63,044 at 65,108 & 65,104.

[119] *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

the Commission's range of discretion to remedy unduly discriminatory rates. We first examine the workings of the UPSA and the 1982 System Agreement and then review the evidentiary basis for FERC's determination that the Agreements as filed were unduly discriminatory. We then address petitioners' claims that FERC was required to adopt a remedy other than the one it chose. Finally, we consider several remaining issues such as Commissioner Richard's refusal to recuse himself and FERC's refusal to reopen and update the record.

A.

Under section 206 of the Federal Power Act ("FPA"), FERC must determine whether an agreement as filed is "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a) (1982). If the agreement is just and reasonable, then it is approved as filed. If, on the other hand, the agreement is unduly discriminatory, then FERC is required to "determine the just and reasonable . . . contract to be thereafter observed and in force, and shall fix the same by order." *Id.*

In this case, FERC reviewed "two initial decisions in dockets which are not consolidated but which have overlapping issues concerning the appropriate allocation of capacity costs incurred on the . . . (MSU) system." 31 F.E.R.C. (CCH) at 61,631. Thus, FERC considered whether the UPSA and the 1982 System Agreement, taken together, were just and reasonable.

To understand the Commission's decision, it is necessary to examine the workings of the UPSA and the System Agreement in detail. The UPSA resulted from negotiations among the four operating companies and MSE in 1979. These negotiations produced the 1981 Reallocation Agreement in which the companies agreed that all Grand Gulf power would be purchased by LP&L, MP&L and NOPSI in definite percentage shares. AP&L relinquished all interest in Grand Gulf, and the other operating com-

panies agreed to indemnify and hold AP&L harmless for its obligations to lenders under the 1974 Availability Agreement.

Pursuant to the Reallocation Agreement, the parties executed the UPSA in June 1982 to be filed with FERC. The UPSA provides in pertinent part:

> 1.2 The Purchasers shall, subject to the terms and conditions of this Agreement, be entitled to receive all of the Power which shall be available to MSE at the Project in accordance with their respective Entitlement Percentages. The Entitlement Percentages are as follows:

	Entitlement Percentages Unit No. 1
LP&L	38.57%
MP&L	31.63%
NOPSI	29.80%
	100.00%

26 F.E.R.C. (CCH) at 65,097. The UPSA further provides that LP&L, MP&L and NOPSI shall pay MSE the same proportionate shares of the total capital and operating costs of the Grand Gulf unit. *Id.* Thus, the UPSA allocates Grand Gulf *capacity* and *energy* in identical shares.

Meanwhile, in April 1982, MSU filed the 1982 System Agreement with FERC to create a new rate schedule for the generation and consumption of the System's energy. A critical aspect of the 1982 System Agreement, for our purposes, is that it does not apply to Grand Gulf. That is, it assumes the existence of the UPSA and its allocation of Grand Gulf capacity and energy. Thus, the 1982 System Agreement may be read and applied properly only by recalling the Grand Gulf allocations fixed by the UPSA.

Under the 1982 System Agreement, capacity and energy costs are allocated separately. As for energy, each com-

pany is entitled to first call on the lowest cost energy generated by the plants located within its service area (and by Grand Gulf up to its UPSA percentage entitlement). The energy generated by a company's plants in excess of that company's demand goes into a pool of energy available to companies whose plants produce less energy than they demand. Such companies may purchase the lowest cost energy available in the pool.

The 1982 System Agreement also establishes a formula to equalize roughly the costs of *capacity* to generate energy. This is achieved by equalizing capacity among the operating companies with corresponding capacity equalization payments. Companies that are "long" on capacity—*i.e.*, those whose percentage of total System capacity exceeds their percentage of total System demand—contribute their excess capacity to "short" companies—*i.e.*, companies whose percentage of total System capacity is less than their percentage of total System demand. In return, the "short" companies make capacity equalization payments to the "long" companies. Under the 1982 System Agreement, these payments are based on the investment costs of "intermediate" oil and gas fired generation facilities, which are much lower than the investment costs of newer coal and nuclear units. In determining whether, and to what extent, a company is long or short, the System considers not only the capacity of units located in that company's service area, but also the share of Grand Gulf capacity to which that company is entitled under the UPSA.

The operating companies intended to roughly equalize the System's capacity costs among themselves by executing the UPSA and the 1982 System Agreement. And, indeed, *at the time they were negotiated*, these agreements appeared to achieve that objective. When the UPSA was negotiated in 1979, Grand Gulf capacity appeared to be a good buy. The initial cost estimate for building *both* Grand Gulf units was $1.3 billion; by the

time the first unit began operations in 1985, however, the final cost for that unit alone was $2.7 billion. It seems unlikely that, in 1979, the companies could have foreseen that the cost of completing Grand Gulf would quadruple because of the lengthy regulatory delays that would occur in the aftermath of the Three Mile Island accident. The System Agreement's formula for roughly equalizing capacity costs among the companies also appeared reasonable when negotiated. Capacity equalization payments were based on the costs of oil and gas fired units, rather than the more costly nuclear and coal fired units. Historically, a company's ability to construct oil and gas fired units depended on the existence of sufficient natural resources within its service area. By contrast, the ability to build coal and particularly nuclear units was less restricted. Thus, when the System decided to shift to coal and nuclear capacity, each of the operating companies was assigned to build nuclear capacity: AP&L was assigned ANO I & II; LP&L was assigned Waterford III; MP&L was assigned Grand Gulf I; and NOPSI was assigned Grand Gulf II. The cost of nuclear capacity was assumed to be roughly equivalent. Thus, each company would share in the cost of the older oil and gas capacity—either by having constructed it or by making capacity equalization payments—and each company would share in the cost of the System's newer capacity—by constructing nuclear and/or coal fired units.

By the time the Commission reviewed the UPSA and the System Agreement, however, conditions had changed radically. Though AP&L had successfully completed the ANO units without substantial cost overruns, *see* 31 F.E.R.C. (CCH) at 61,669 n.17, the cost of constructing Grand Gulf I and Waterford III approached three to four times original estimates. As ALJ Liebman recognized, "[d]isparate rates are legitimate under section 205(b) of the FPA if sufficient factual bases exist to justify the difference." 26 F.E.R.C. (CCH) at 65,106 (*citing Metropolitan Edison Co.* v. *FERC*, 595 F.2d 851, 857, 858

(D.C. Cir. 1979)). Upon reviewing the nature and operation of the MSU System, Judge Liebman concluded that the facts were insufficient to outweigh "the profound undue discrimination caused by [the UPSA] allocation." *Id.* at 65,108. The Commission affirmed, concluding that "the 1982 System Agreement and the UPSA, as filed, together will [not] achieve proper cost allocation," and that "the 1982 System Agreement in conjunction with Judge Liebman's allocation of nuclear capacity will achieve just and reasonable results." 31 F.E.R.C. (CCH) at 61,655.

B.

The Commission based its decision primarily upon two findings: (1) "the fact that all Middle South System nuclear units have been planned to meet overall System needs and objectives," and (2) "the unforeseen problems unique to constructing nuclear units." 31 F.E.R.C. (CCH) at 61,655 (footnote omitted). The Commission's first finding is more than adequately supported by the record. The Commission began by discussing the composition of, and key role performed by, the System Operating Committee. The Operating Committee is composed of five members: one representative from each of the four operating companies and one from the System's wholly-owned service company, Middle South Services, Inc. ("MSS"). *See* 31 F.E.R.C. (CCH) at 61,646; 30 F.E.R.C. (CCH) at 65,143. The Commission undertook a thorough review of the record testimony of current and former System executives, *see* 31 F.E.R.C. (CCH) at 61,646-48, as well as various sets of minutes of the System Operating Committee from 1961 to 1980, *see id.* at 61,648-50. This evidence amply supports the Commission's conclusion that although individual operating companies were intimately involved in the planning stages of new generation units and sought to promote their own interests, "the Operating Committee nevertheless made the major decisions concerning general timing, location and size of plant additions, in view of the overall needs of the system,

while accommodating individual company needs wherever possible." *Id.* at 61,650. For example, Mr. Trumps, an MSS official, testified that "generation planning has been done on a systemwide basis, but with due consideration of the needs of the individual companies as to the location of new facilities." *Id.* at 61,647. Mr. Trumps also testified that under the 1973 System Agreement, an individual operating company could not block an Operating Committee decision since that body acted by two-thirds vote, and that the 1982 System Agreement further strengthened the Committee's position by authorizing decisions to be made by majority vote. *See id.* at 61,651.

In making its findings about the System's planning and operations, FERC expressly rejected ALJ Head's contrary findings as unsupported by the evidence. First, the Commission rejected Judge Head's conclusion that there is "a pattern of autonomy on the part of the individual operating companies, particularly as to specific plant site locations, fuel and financing." 30 F.E.R.C. (CCH) at 65,168. The Commission acknowledged that the operating companies "exercise[] their authority to decide details such as specific location, timing, and sizing of [an assigned] unit," 31 F.E.R.C. (CCH) at 61,650, but rightly concluded that this fact does not affect the finding that "decisions on the MSU System are made based on an overall *System* plan and primarily for the System as a whole," *id.* (emphasis in original).

Second, and more important for our purposes, the Commission rejected ALJ Head's determination that Grand Gulf is "an anomaly to the regular planning and construction of generating facilities by the operating companies of the Middle South system." 30 F.E.R.C. (CCH) at 65,172. Again, the Commission's conclusion is supported by the record. Relying on the testimony of Mr. Lupberger, an officer of MSU, MSE and MSS, the Commission began by recalling that in the late 1960's and early 1970's, the System decided to change its fuel mix

by shifting away from oil and gas generation in favor of nuclear and coal capacity. *See* 31 F.E.R.C. (CCH) at 61,651. Pursuant to that decision, AP&L was assigned to build the ANO units and MP&L was assigned to construct Grand Gulf I. After reviewing the relevant testimony, FERC concluded that "[t]he evidence supports a finding that the Grand Gulf units were originally planned in the same manner as the other nuclear units, *i.e.*, to meet MP&L's needs, to meet System needs, and to meet the System goal of diversifying fuel mix." 31 F.E.R.C. (CCH) at 61,653. The Commission recognized that the way in which Grand Gulf had to be financed, *see supra* pp. 17-18, resulted in differences between Grand Gulf and other system units, all related to the fact that MSE, rather than an individual operating company, owns and operates the plant. *See id.* But, as FERC correctly observed, these differences "arose solely from the fact that MP&L became unable to finance the Grand Gulf units on its own. They do not contradict the fact that Grand Gulf 1 and 2 were planned in the same manner as the other nuclear units on the system." *Id.* at 61,653-54. Indeed, Mr. Lupberger's testimony was that the system employed the same general process in deciding to build Grand Gulf as it did in deciding to build the ANO units. *See id.* at 61,654.

Having determined that "all Middle South System nuclear units have been planned to meet overall System needs and objectives," 31 F.E.R.C. (CCH) at 61,655, the Commission's conclusion that the UPSA and the 1982 System Agreement, as filed, were unduly discriminatory follows almost as a matter of course. Under the Agreements as filed, the cost of nuclear capacity varied widely from company to company. For example, the cost to AP&L for its 1694 megawatts of nuclear capacity was $900 million, while the cost to LP&L for 1538 megawatts was $3.4 billion, approximately four times as much. *See* 26 F.E.R.C. (CCH) at 65,107. Similarly, the cost to MP&L for 356 megawatts and to NOPSI for 335 mega-

watts was $800 million and $700 million, respectively, while AP&L received 1694 megawatts, approximately five times the capacity of either, for just $900 million. *See id.* As already discussed, the 1982 System Agreement's provision for capacity equalization payments does little, if anything, to reduce these vast nuclear capacity cost disparities. That is because AP&L is currently a "long" company, *see* 30 F.E.R.C. (CCH) at 65,166, and, in any event, capacity equalization payments are based on the costs of oil and gas fired units rather than more costly nuclear units such as Grand Gulf and Waterford III. Given the degree of integration on the MSU System, FERC could properly conclude that the tremendous disparities in nuclear capacity costs among the operating companies disrupt the System's historical pattern of roughly equalizing capacity costs and thus constitute undue discrimination under section 206 of the Federal Power Act.

The second finding upon which the Commission's decision rests—the existence of "unforeseen problems unique to constructing nuclear units," 31 F.E.R.C. (CCH) at 61,655—relates primarily to FERC's choice of means to remedy the undue discrimination on the system. Petitioners do not seriously dispute the existence of this finding; rather, they challenge the use to which it was put by the Commission. For example, the Arkansas-Missouri parties argue that FERC erred by considering facts and circumstances that arose after the execution of the UPSA in evaluating the reasonableness of that agreement. Rather, they assert that the Commission could do no more than "examin[e] the factual circumstances that prevailed at the time the UPSA was formulated in 1979-80." Brief of Petitioners Arkansas Public Service Commission, Missouri Public Service Commission, Arkansas-Missouri Congressional Delegation and State of Arkansas ("Arkansas-Missouri Pet. Br.") at 66; *accord* Brief for Petitioner Arkansas Power & Light Company ("AP&L Pet. Br.") at

45. We find this contention to be completely without merit.

Under the FPA, the Commission has a statutory duty to reform unlawful rates and establish just and reasonable ones, *see* 16 U.S.C. § 824e(a) (1982), and a statutory right to order production of, and to examine, "all accounts, records, and memoranda of licensees and public utilities," *id.* § 825(b), in performing that duty. This, in effect, was the Commission's response on rehearing: "The salient issue here is not whether the agreement was reasonable when made, or whether it met the System objectives at the time it was made. Rather, the principal inquiry is whether the allocation is appropriate based on the evidentiary record that was subsequently developed." 32 F.E.R.C. (CCH) at 61,957.

The Arkansas-Missouri parties appear to ignore this rationale and argue simply that FERC's evaluation of the UPSA in light of subsequent events conflicts with prior Commission precedent. *See* Arkansas-Missouri Pet. Br. at 67-68; AP&L Pet. Br. at 46-48. The cited cases are inapposite to the Commission's review of the UPSA. They establish only that the *prudence* of power supply arrangements and generation construction activities must be evaluated on the basis of circumstances prevailing at the time the activity was undertaken, and are thus limited to "prudence review"—examinations of utilities' decisions to incur costs. The Commission's inquiry is quite distinct. A system's allocation of nuclear capacity costs may not be imprudent on the part of the parties at the time they agree to incur them, but might nevertheless result in present undue discrimination. Accordingly, the cases present no bar to the Commission's reliance on the record to perform its statutory duty under section 206 of the FPA.

AP&L advances an additional argument against the Commission's second finding: "there is no substantial evidence of record put forth by the agency to support its

conclusion that the alleged problems were 'unforeseen.'" AP&L Pet. Br. at 45-46. Besides erroneously placing the burden of proof on the Commission, *see San Luis Obispo Mothers for Peace* v. *NRC*, 789 F.2d 26, 37 (D.C. Cir.) (en banc) (Commission's failure to "include citations to specific pages of the record . . . provides no basis for overturning the Commission's decision"), *cert. denied*, 107 S. Ct. 330 (1986), this objection is simply irrelevant. Even if we assume that the problems were foreseen when the UPSA was negotiated and that the parties *intentionally* entered into an unduly discriminatory agreement, the Commission's duty to reject the agreement as filed would not be diminished.

The Commission's second finding supports the Commission's choice of means to remedy the undue discrimination created by the UPSA and the 1982 System Agreement. That choice was to adopt ALJ Liebman's allocation of Grand Gulf and approve the 1982 System Agreement as filed. We hold that this choice was within the Commission's discretion to remedy the undue discrimination it identified on the System. We first examine the Commission's remedy in more detail and then consider the various petitioners' objections and alternate proposals.

The Commission allocated Grand Gulf responsibility as follows:

AP&L	36%
LP&L	14%
MP&L	33%
NOPSI	17%

See 31 F.E.R.C. (CCH) at 61,633. The effect of this allocation is "not just to allocate Grand Gulf costs, but to allocate the costs of all nuclear capacity on the MSU system." *Id.* This can be seen by following the steps necessary to arrive at this allocation. The System's total nuclear capacity costs are determined by summing the investment costs of all nuclear units on the System, ANO I & II, Waterford III and Grand Gulf. Multiplying this

figure by each company's relative share of total system demand yields each company's total cost responsibility in dollars. The amount of each company's prior nuclear investment costs is then subtracted to yield each company's Grand Gulf cost responsibility. Finally, these figures are divided by Grand Gulf's total investment cost to yield the percentage of Grand Gulf capacity for which each company is responsible. *See* 31 F.E.R.C. (CCH) at 61,655. "The result of this allocation of Grand Gulf is to give each operating company a share of the cost of nuclear capacity roughly proportionate to that company's relative share of system demand . . . ." 26 F.E.R.C. (CCH) at 65,109. The Commission's rationale for adopting this allocation is considered in the context of the various objections and alternate allocations advanced by the petitioners.

C.

Petitioners advance numerous arguments in opposition to the Commission's decision and propose various alternate allocations. We address these arguments in the context of reviewing each proposed alternate allocation.

1. *The UPSA and the 1982 System Agreement*

AP&L and the Arkansas-Missouri parties advocate approval of the UPSA and the 1982 System Agreement as filed. In so doing, they attack the Commission's decision on several grounds. We have already considered and rejected two of these grounds in the preceding section. *See supra* pp. 69-72. The remaining grounds are considered here.

First, AP&L argues that in reforming the UPSA, "the FERC failed to give weight to the Congressional policy favoring voluntary power pooling agreements by 'cavalierly disregarding' the reasonableness of the specific agreements that were filed with the agency." AP&L Pet. Br. at 41 (*quoting ANR Pipeline Co.* v. *FERC*, 771 F.2d 507, 519 (D.C. Cir. 1985)). While it is true that sec-

tion 202(a) of the FPA seeks to encourage voluntary power pooling transactions, *see* 16 U.S.C. § 824a(a) (1982), AP&L's argument is no more than an attack on the Commission's finding that the agreements as filed are unduly discriminatory. But we have already held that that finding is virtually inescapable, given the record in this case, *see supra* pp. 68-69, and we reject any suggestion that the FPA's policy to encourage voluntary power pooling agreements could override the Commission's specific obligation in section 205 of that Act to reject such agreements if found to be "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a) (1982).

Second, the Arkansas-Missouri parties assert that the Commission's decision is "inconsistent with the Commission's own established precedent in *Nantahala Power & Light Company*, Opinions Nos. 139 and 139-A, 19 FERC (CCH) ¶ 61,152 (1982) and 20 FERC (CCH) ¶ 61,430 (1982), *aff'd*, 727 F.2d 1342 (4th Cir. 1984), and *Georgia Power Company*, Opinion No. 711, 52 FPC 1343 (1974), *aff'd*, Opinion No. 711-A, 53 FPC 1103 (1975)." Arkansas-Missouri Pet. Br. at 54. Though these cases involve Commission refusals to equalize costs, they provide no support for petitioners in this case.

Georgia Power involved a challenge to Georgia Power's reliance on its own generation and transmission costs to establish its cost of service. The challenger argued that Georgia Power was part of an integrated electric utility system whose production costs should be allocated to its members on a system, rather than individual company, basis. Finding that the existing allocation was not unjust and unreasonable, the Commission declined to order a "rolled-in" or equalized cost allocation. Petitioners' argument ignores the fact that the FPC found no undue discrimination. The case is distinguishable on that basis alone. Moreover, the *Georgia Power* Commission suggested that a case involving companies' reliance on "large

multi-company generating units which are remote from their service areas" might necessitate some form of cost equalization. *See* 52 F.P.C. at 1349. Grand Gulf is such a unit. Thus, we hold that *Georgia Power*'s refusal to equalize costs in the absence of undue discrimination does not apply where, as here, the Commission found such discrimination in the presence of a multistage generating unit.

Nantahala involved an agreement between Nantahala Power & Light Co. and Tapoco, both wholly-owned subsidiaries of Alcoa, apportioning the capacity and energy which both companies were jointly entitled to receive from the Tennessee Valley Authority. That entitlement arose from a series of agreements among TVA, Alcoa, Nantahala and Tapoco under which Nantahala and Tapoco turned over land and generating facilities to TVA for development of the Fontana Dam in exchange for capacity and energy entitlements. The Commission found the apportionment agreement between Nantahala and Tapoco to be unfair. Though the Commisison declined to order full cost equalization, it increased Nantahala's entitlement to remedy the unfairness. The Commission's decision was based, in part, upon its conclusion that the two companies do *not* operate as an integrated system. *See* 19 F.E.R.C. (CCH) at 61,277. This conclusion was affirmed by the Fourth Circuit as based on substantial evidence. *See Nantahala Power & Light Co.* v. *FERC*, 727 F.2d 1342, 1348 (4th Cir. 1984).

In the case at bar, the Commission's review of the evidence led it to reach precisely the opposite conclusion—that the MSU system is highly integrated. That determination is supported by substantial evidence. *See supra* pp. 66-68. Moreover, the Commission has *not* ordered full production costs, or even nuclear production cost equalization in this case. Rather, as in *Nantahala*, it has ordered a more limited remedy designed only to cure the undue

discrimination found. Thus, petitioners' argument that the Commission went too far in this case is without merit.

Third, AP&L argues that the energy from its "less costly base load generation is displaced from AP&L's usage, to become 'exchange energy' and be sold into the pool for the benefit of the other operating companies." AP&L Pet. Br. at 50. This argument is simply wrong. Under the 1982 System Agreement, AP&L is entitled to first call on its own lowest cost energy, whatever the source. Thus, if ANO I & II produce AP&L's lowest cost energy and AP&L's demand exceeds the amount produced, then AP&L will retain all of the benefits of the ANO units regardless of its Grand Gulf allocation. If anything, more expensive, not less expensive, energy will be displaced. AP&L's real complaint is that it must pay its equitable share of Grand Gulf's *capacity* costs.

Fourth, AP&L argues that the Commission's decision compels it "to pay more for nuclear capacity than is justified by [its] actual ownership costs, and at the same time allows the other operating companies to pay less for nuclear capacity than their actual ownership costs." AP&L Pet. Br. at 55-56 (footnote omitted). This argument is difficult to understand. The premise seems to be that AP&L's "actual ownership costs" are only those associated with ANO I & II, while the other companies' include the costs of Grand Gulf. The premise is incorrect. Under the Commission's allocation, each company is responsible for the costs of its own nuclear units as well as its share of Grand Gulf. AP&L's argument is really that it should pay for none of the costs associated with Grand Gulf—the situation under the UPSA as filed. But, as we have already held, FERC correctly found that the UPSA allocation results in unlawful discrimination.

In short, AP&L and the Arkansas-Missouri parties have advanced no persuasive argument against the Commission's decision to reject the UPSA as filed.

2. *ALJ Head's Allocation*

Petitioners City of New Orleans, Mississippi Industries, MP&L, and Representative Webb Franklin, and intervenor Representative Wayne Dowdy support the Commission's finding of undue discrimination, but argue that the Commission erred in deciding to equalize all nuclear capacity costs. Rather, they assert that the Commission should have adopted ALJ Head's solution of equalizing only the investment costs associated with Grand Gulf. *See* Consolidated Brief of Petitioners Mississippi Industries, Mississippi Power & Light Company, and Representative Webb Franklin, and Intervenor Representative Wayne Dowdy ("Consolidated Pet. Br.") at 60-61; Brief of Petitioner City of New Orleans, Louisiana ("New Orleans Pet. Br.") at 48-50.

Putting aside for the moment these petitioners' arguments *against* the allocation ordered by FERC, we have little difficulty affirming FERC's rejection of Judge Head's solution. That solution rests on Judge Head's finding that Grand Gulf is an anomaly on the MSU System—the only facility planned and constructed for the benefit of the system as a whole. *See* 30 F.E.R.C. (CCH) at 65,170-72. FERC expressly rejected this finding, concluding instead that Grand Gulf was "planned in the same manner as the other nuclear units on the System." 31 F.E.R.C. (CCH) at 61,654. Thus, Judge Head's solution is viable only if we conclude that the Commission's findings concerning the integration of the MSU System and the status of the Grand Gulf unit are not based on substantial evidence. We have already concluded that they are. *See supra* pp. 66-68.

In advocating adoption of Judge Head's solution, petitioners rely primarily on three arguments against FERC's chosen allocation. First, they assert that the Commission's decision irrationally allocates 33% of Grand Gulf to MP&L, an increase over the 31.63% allocated to MP&L

under the unduly discriminatory UPSA. Second, they argue that FERC did not adequately explain why it focused on nuclear but not coal facilities in equalizing capacity costs. Third, they assert that MP&L and NOPSI receive less nuclear capacity per nuclear investment dollar than does AP&L. As explained below, we find that none of the arguments advanced by these petitioners requires reversal of the Commission's decision.

Petitioners' first objection is that "[t]he Commission failed to reconcile its allocation scheme imposing 33 percent of Grand Gulf costs on Mississippi with the finding that a 31.63 percent allocation was detrimental and unjustified." Consolidated Pet. Br. at 39. The argument is that because the UPSA was found to be unduly discriminatory, an allocation to MP&L greater than that found in the UPSA necessarily must be unlawful. The argument misconstrues the nature of the statutory inquiry. The question is whether the agreement is unduly discriminatory or preferential. Thus, there is no inconsistency in the Commission's determination that the UPSA's allocation of 31.63% of Grand Gulf to MP&L and 0% to AP&L is unduly discriminatory but that a 33% allocation to MP&L and a 36% allocation to AP&L is not. That is because a party claiming discrimination, by definition, objects only to his treatment as compared to that of other similarly situated parties. Thus, the reasonableness of the Commission's allocation may be judged only by examining the relative impact on the four operating companies and the degree to which they are similarly situated.

Petitioners' second argument is no more availing. They assert that "the system's planned shift to primary reliance on coal and nuclear generation . . . plainly does not support focusing exclusively on nuclear generation and excluding coal-fired baseload units from that formula." Consolidated Pet. Br. at 45-46; *accord* New Orleans Pet. Br. at 43. This argument is misleading. While the Sys-

tem's move toward coal and nuclear facilities might support equalization of the capacity costs of both coal and nuclear units, it does not *preclude* FERC's decision to equalize only the investment costs of the nuclear units. Petitioners' argument ignores the Commission's explicit finding that the unforeseen problems that led to dramatic cost overruns were "unique to constructing nuclear units." 31 F.E.R.C. (CCH) at 61,655 (footnote omitted). In this circumstance, we find that the Commission's focus on nuclear but not coal units was rational.

Petitioners argue further that "[t]o the extent that unexpectedly high costs of [nuclear] facilities support special allocation treatment, the stated reason supports only a grouping of Grand Gulf 1 and Waterford 3." New Orleans Pet. Br. at 44; *see* Consolidated Pet. Br. at 46-47. They argue that to include the ANO units but not the coal units was arbitrary and capricious since the investment costs of the former are comparable to those of the latter. To be sure, this fact would have justified a Commission decision to equalize only the investment costs of Grand Gulf and Waterford III. (Interestingly, neither these petitioners nor any others have advanced this option here or below.) But, we conclude that the Commission also rationally could include the ANO units. Indeed, FERC decided to include them precisely because their investment costs were *not* comparable to those of the more recent nuclear units. The Commission decided to equalize the investments cost of all nuclear units because their widely divergent costs were due solely to the timing of their construction, *see* 32 F.E.R.C. (CCH) at 61,960-61, a reason insufficient to justify the differences.

Petitioners' third argument is that the Commission's allocation is itself unduly discriminatory because it allocates only the investment costs of nuclear capacity but not the benefits produced by that capacity. Thus, "MP&L must pay approximately 15 percent of the aggregate cost of nuclear capacity on the MSU system, but receives the

benefit of only 9.5 percent [(or 371 megawatts)] of that capacity." Consolidated Pet. Br. at 63. AP&L, on the other hand, is responsible for only 33% of the System's nuclear investment costs, but is entitled to first call on the energy produced by 2099 megawatts, or 53.5%, of that capacity. *See* 26 F.E.R.C. (CCH) at 65,109. In addition, LP&L pays for 44%, and NOPSI pays for 8%, of the System's nuclear capacity costs, but receive only 1262 megawatts (or 32%), and 191 megawatts (or 5%), of nuclear capacity, respectively. *See id.* The reason for these differences is that AP&L's nuclear capacity is made up of inexpensive ANO capacity as well as capacity from Grand Gulf; all other operating companies' nuclear capacity is composed entirely of expensive Grand Gulf and Waterford III capacity.

In our opinion, the Commission acted within its discretion in ordering equalization of nuclear investment costs without equalization of nuclear capacity. The Commission's allocation serves to restore a *rough* equalization of all System capacity costs among the operating companies. In view of the fact that such costs have never been precisely equalized on the System, FERC was required to do no more to remedy the undue discrimination it found. As the Commission emphasized on rehearing:

> What our decision purports to do is to eliminate *drastic* rate disparities at the wholesale rate level which are associated with units used for the mutual benefit of all companies, and to do so in a manner which disturbs the historical operation of the System as little as possible, and which allows the individual companies to retain as fully as possible the benefits of units they have financed and constructed. In other words, we have sought to achieve an equitable balance between the interests of the individual companies and the System as a whole, consistent with the System Agreement.

32 F.E.R.C. (CCH) at 61,959 (emphasis added).

Petitioners' argument is even less persuasive when it is recalled that these petitioners advocate adoption of

Judge Head's solution as just and reasonable. Judge Head's solution was to allocate only the costs and capacity of Grand Gulf in proportion to each company's relative share of System demand, without regard to prior nuclear investment. But under this scheme, MP&L's nuclear cost responsibility as a proportion of total System nuclear costs would still exceed its proportion of total System nuclear capacity. This is so because although AP&L would be allocated a greater share of Grand Gulf responsibility, it would still be able to reduce its *average* nuclear capacity costs, with capacity from its less expensive ANO units; MP&L's nuclear capacity, though smaller, would still consist entirely of expensive Grand Gulf capacity. Petitioners' simultaneous claims that FERC's allocation must be rejected as unduly discriminatory because it mismatches nuclear costs and capacity and that an alternate allocation that also fails to match nuclear costs and capacity is just and reasonable reveals the real reason for their support of Judge Head's solution. It is not that it resolves the flaws they see in the FERC allocation, but simply that it allocates them less Grand Gulf responsibility. Under these circumstances, the objection that the Commission mismatched costs and benefits rings rather hollow.

The City of New Orleans advances an additional reason why the Commission's allocation should be considered unduly discriminatory: AP&L's average cost for the nuclear *energy* produced by its capacity is 5.7 cents per kWh while the average cost of the nuclear energy produced by the other companies' nuclear capacity is 15 cents per kWh. *See* New Orleans Pet. Br. at 35. The objection is apparently that the Commission failed to equalize the companies' nuclear *production* costs and that this failure results in unduly discriminatory rates. Again, it is curious that this objection comes from a party that advocates adoption of Judge Head's solution since that solution seeks only to equalize Grand Gulf *capacity* costs,

not nuclear production costs. Nevertheless, the objection does not undermine FERC's allocation.

The Commission's decision sought only to remedy the drastic disparities in the costs of building the System's nuclear capacity by roughly equalizing the investment cost of that capacity among the companies. That step was considered sufficient to restore rough equality among the companies' overall capacity costs. Petitioner's objection is that the Commission failed to equalize nuclear *production* costs—*i.e.*, the costs of producing nuclear energy. There is no reason for the Commission to have focused on nuclear production costs rather than overall production costs. As previously discussed, only Grand Gulf energy is allocated with capacity. All other energy —whatever its source—is allocated pursuant to the 1982 System Agreement, with each company entitled to first call on its own lowest cost energy. Historically, and under the 1982 System Agreement, production costs have never been precisely equalized. These costs varied from company to company depending on each company's fuel mix at any given time. ALJ Head reviewed the companies' relative projected average annual production costs over a nine-year period under several alternative allocations. *See* 30 F.E.R.C. (CCH) at 65,156-57. For example, the nine-year average of production costs under the 1982 System Agreement as filed would be as follows:

AP&L — 7.47 cents/kWh
LP&L — 8.59 cents/kWh
MP&L — 11.00 cents/kWh
NOPSI — 11.65 cents/kWh

See id. at 65,157. The nine-year average under one of the production cost equalization proposals would be as follows:

AP&L — 8.82 cents/kWh
LP&L — 7.61 cents/kWh
MP&L — 9.46 cents/kWh
NOPSI — 8.96 cents/kWh

See id. Despite the production cost disparities under the 1982 System Agreement, Judge Head found no undue discrimination: "none of the differences brought out on the record are so compelling that they require the adoption of one form of production cost allocation." *Id.* at 65,169. Accordingly, he approved the 1982 System Agreement as filed.

Like ALJ Liebman, however, Judge Head found undue discrimination in the System's allocation of *capacity* costs. Unlike Judge Liebman, however, Judge Head believed this discrimination could be remanded by equalizing the investment costs of Grand Gulf alone rather than all nuclear capacity on the System. *See id.* at 65,172. Moreover, Judge Head pointed out that allocating AP&L a share of Grand Gulf capacity and energy would also serve to reduce the *production* cost disparities identified under the 1982 System Agreement. *See id.* at 65,169.

In view of Judge Head's above findings, affirmed and adopted by the Commission, *see* 31 F.E.R.C. (CCH) at 65,656, petitioner City of New Orleans' suggestion that production cost disparities among the companies require reversal of FERC's decision must be rejected. We affirm the finding by Judge Head and the Commission that production cost disparities under the 1982 System Agreement do not amount to undue discrimination. In deciding what discrimination is "undue," the Commission necessarily possesses discretion and exercises judgment in light of the facts established by the record. In this case, Judge Head identified "a strong factual reason for not restructuring the system to meet the current [production] cost disparity problems": "production cost equalization would be inconsistent with the history of intercompany transaction on the Middle South system." 30 F.E.R.C. (CCH) at 65,170. Like Judge Head's solution, the Commission's decision alters the UPSA by allocating AP&L a share of Grand Gulf responsibility. Indeed, since the Commis-

sion's decision allocates AP&L more Grand Gulf responsibility (36%), the former does even more than the latter to reduce the production cost disparities among AP&L and the other companies.

3. *Participation Unit Concept*

The remaining Mississippi petitioners—the Mississippi Public Service Commission, the Mississippi Attorney General, and the Mississippi Legal Services Coalition—raise many of the arguments relied on by the petitioners who support Judge Head's solution. These petitioners, however, urge a return to the participation unit method of allocating the System's excess capacity.

Like the other Mississippi parties, these petitioners argue that the Commission's decision mismatches nuclear investment costs and benefits and irrationally increases MP&L's Grand Gulf responsibility from 31.63% to 33%. We have already considered and rejected these arguments, *see supra* pp. 76-80, and these petitioners' contentions require only minimal additional discussion.

In objecting to the Commission's decision to increase MP&L's Grand Gulf responsibility, petitioners take issue with the Commission's observation that the result of its decision "is that all three major geographical areas served by the MSU System will share similar Grand Gulf cost burdens: AP&L—36%; MP&L—33%; and LP&L/NOPSI—33%." 32 F.E.R.C. (CCH) at 61,960. They claim that this "response" is "grossly inadequate" to explain why the Commission's allocation to MP&L is just and reasonable while the UPSA's slightly smaller allocation is not. *See* Brief of Petitioners, The Mississippi Public Service Commission, Edwin Lloyd Pittman, Attorney General for the State of Mississippi, and Mississippi Legal Services Coalition ("Mississippi Pet. Br.") at 56. Rather than focusing on geographical areas, they assert, "one must look at the actual size of each company in

order to assess the impact of the Grand Gulf allocation or cost burden on that company's individual ratepayers." Mississippi Pet. Br. at 60. This argument misunderstands the significance of the Commission's observation. Contrary to petitioners' suggestion, the Commission has not stated that any allocation that spreads costs proportionately over geographic regions is just and reasonable. By allocating nuclear investment costs according to relative demand, the Commission expressly recognized that Arkansas, Mississippi and Louisiana do not have equal loads. The Commission's point is simply that its allocation, unlike the UPSA's, requires Arkansas to bear a proportionate share of nuclear investment costs. It was the *relative* impact of the UPSA that FERC found unduly discriminatory. By requiring AP&L to share in the costs of Grand Gulf, the Commission could reasonably adopt an allocation that also slightly increased MP&L's responsibility.

We also have little difficulty rejecting petitioners' submission that "the participation unit concept utilized under the 1973 System Agreement is a concept for equalizing excess capacity which is . . . just, reasonable, and not unduly discriminatory." Mississippi Pet. Br. at 73. Under this proposal, the System would return to the 1973 System Agreement with MSE, the MSU subsidiary that owns Grand Gulf, as a party. Since MSE is not an operating company and has no demand, it will always be "long" on capacity, making Grand Gulf a participation unit. This means that the responsibility for Grand Gulf would be borne entirely by the "short" companies, shifting somewhat over time as the operating companies became more or less long or short.

Both Judge Liebman and Judge Head concluded that this proposal would be unduly discriminatory. *See* 30 F.E.R.C. (CCH) at 65,167; 26 F.E.R.C. (CCH) at 65,112. The Commission adopted and affirmed the findings of both judges on this point. *See* 31 F.E.R.C. (CCH)

at 61,655-56. These findings are conclusively established by the record. Petitioners acknowledge that MP&L is currently a "long" company and expected to remain so for approximately ten years. This means that LP&L and NOPSI, the "short" companies, would bear almost all of the responsibility for Grand Gulf during this period. That the proposal would result in profound discrimination is most readily seen by observing its impact on LP&L. As discussed, Grand Gulf and Waterford III are unique on the System in that it is the dramatic cost escalations of these units that disrupted the System's rough equalization of capacity costs among the operating companies. *See* 31 F.E.R.C. (CCH) at 61,654; *supra* pp. 69-71. Already saddled with 100% of the costs of Waterford III, LP&L would be required under petitioners' proposal to pay 90 to 100% of the costs of Grand Gulf over the next ten years. *See* 26 F.E.R.C. (CCH) at 65,112. As Judge Head recognized, the astronomical costs of Grand Gulf and Waterford III mean that these two units alone "will account for over 70% of the total system investment in production plant." 30 F.E.R.C. (CCH) at 65,145. Requiring one company to bear virtually all of the costs of both units exaggerates rather than alleviates the undue discrimination found under the UPSA and 1982 System Agreement. The Commission properly rejected this proposal.

4. *Production Cost Equalization*

The Louisiana petitioners—the Louisiana Public Service Commission, the State of Louisiana, Occidental Chemical Corporation, Georgia Gulf Corporation, and Jefferson Parish, Louisiana—support the Commission's finding of undue discrimination, but argue that some form of production cost equalization would be a more equitable and efficient remedy than the one ordered by the Commission. Petitioners' main contention is that the Commission failed adequately to explain its decision not to order full production cost equalization. We find this contention with-

out merit and hold that the Commission acted within its discretion in ordering a less intrusive means of remedying the undue discrimination found on the System.

Petitioners argue at length that, like the Commission's remedy, "production cost equalization is also fully supported by the Commission's conclusions of law and findings of fact, and that [the] latter alternative would more directly and more expeditiously achieve the objectives identified by the Commission as the basis for adopting nuclear investment equalization." Initial Brief of Petitioners Occidental Chemical Corporation, Georgia Gulf Corporation, and Jefferson Parish, Louisiana ("Louisiana Parties' Pet. Br.") at 33; *see* Brief of the Louisiana Public Service Commission and the State of Louisiana, Petitioner and Intervenor ("Louisiana Pet. Br.") at 44-47. Petitioners are surely correct in their assertion that production cost equalization would "virtually eliminate[] the possibility of serious future imbalances in generation cost responsibility among the operating companies." Louisiana Parties' Pet. Br. at 36. That, of course, is the nature of the remedy. But we have also concluded that the Commission's chosen remedy is sufficient to remedy the *undue* discrimination on the System; that is, the Commission could properly conclude that the remaining cost disparities do not constitute unlawful discrimination. *See supra* pp. 79-83. The Louisiana parties do not seriously dispute this conclusion. *See* Louisiana Pet. Br. at 39. Rather, their argument is that production cost equalization would remedy System cost disparities even more effectively than nuclear investment cost equalization and that the Commission did not adequately justify its decision to reject the former and adopt the latter. *See* Louisiana Parties' Pet. Br. at 42, 49.

In deciding whether to order production cost equalization or nuclear investment equalization, the Commission confronted a major policy choice. Though both alternatives would remedy undue discrimination, the former

would represent a dramatic disruption of the System's historical operations and of the states' settled interests and expectations. Accordingly, FERC chose the latter alternative. We hold that the Commission's decision was both rational and within its discretion.

Under the Louisiana Public Service Commission's production cost equalization proposal, the investment costs of all System capacity would be combined and allocated among the operating companies according to each company's capability responsibility—that proportion of System capacity equal to each company's proportion of System demand. *See* 30 F.E.R.C. (CCH) at 65,141. In addition, a rate would be established to equalize cost per kWh of all energy produced by that capacity. *Id.* After reviewing the historical operation of the System, Judge Head concluded that "production cost pooling and equalization constitutes a drastic deviation from past practices on the system relating to intercompany transactions and would change the underlying nature of such transactions." *Id.* at 65,168.

> Never during the modern history of the system (1949 on) has there been any arrangement governing intercompany transactions where all the costs of the production plants of the operating companies have been combined and then allocated to the respective operating companies based on some capability responsibility formula.

Id. at 65,167. Rather, the operating companies have always been responsible for the costs associated with the plants they build and finance, costs that necessarily vary somewhat from company to company. In addition, the companies have always had first call on their own lowest cost energy in meeting their demand. The System agreements have sought simply to equalize the System's *excess* energy and capacity among the companies. The *result* has been *rough* equalization of capacity and production costs.

Having found that "it is the large cost escalations of Grand Gulf and Waterford that have disrupted this pattern [of rough equalization]," 31 F.E.R.C. (CCH) at 61,654, the Commission properly decided to take only those steps that were necessary to compensate for this disruption. Those steps were to approve the 1982 System Agreement as filed and order nuclear capacity cost equalization. Production cost equalization would go much further and eliminate virtually all production and capacity cost disparities among the companies. Though we do not say that the Commission could not have ordered production cost equalization on this record, we think that the Commission correctly concluded that it was not necessary to remedy the undue discrimination found on the System. Recognizing that "[f]ull production cost equalization would be a substantial change from the allocation methodologies historically used on the MSU System," 32 F.E.R.C. (CCH) at 61,961, the Commission explained that "the adopted allocation is an attempt to equalize the imbalance of cost on the System with the least disruption possible to the historical operation of the System." *Id.*

Judge Head identified an additional "compelling" policy consideration against production cost equalization: "Federal regulation is meant to be supplemental to, not to supplant, State regulation." 30 F.E.R.C. (CCH) at 65,170. Observing that "the practical effect of ordering production cost equalization would be to bind the local State commissions in many of their rate base determinations," *id.*, Judge Head concluded that the reasons favoring equalization "are not so compelling that they justify the extensive intrusion into an area normally subject to regulation by the State commissions." *Id.* The Commission affirmed this conclusion, *see* 31 F.E.R.C. (CCH) at 61,656, and stated that its decision seeks "to alter in as limited a means as possible the agreed-upon cost scheme, in order to achieve just, reasonable, non-discriminatory and non-preferential rates." 32 F.E.R.C. (CCH) at 61,961. Having determined that production cost equalization was not

necessary to achieve lawful rates, the Commission properly considered the historical operation of the System as well as the regulatory interests of the states in exercising its discretion not to order such equalization. *Cf. Nantahala Power & Light Co.* v. *FERC*, 727 F.2d at 1348 ("A decision to order roll-in is essentially a matter of Commission discretion . . . .").

* * * *

We have now considered petitioners' numerous arguments against the Commission's decision and in favor of various alternate allocations. We find these arguments unpersuasive and hold that the Commission acted within its authority to remedy undue discrimination and that its decision was rational. We also have considered all other arguments suggesting that the Commission acted improperly and find them to be without merit.

D.

In this section, we consider two remaining claims: that Commissioner Richard improperly failed to recuse himself and that the Commission abused its discretion in failing to reopen and update the record.

1. *Recusal*

Several of the Mississippi parties assert that "[t]he failure of Commissioner Oliver G. Richard, III to recuse himself in this case was error." Mississippi Pet. Br. at 71. Their claim is that Commissioner Richard's past association with Senator J. Bennett Johnston of Louisiana —an intervenor below as a member of the full Louisiana congressional delegation—"created the appearance of bias and impropriety sufficient to compel the Commissioner's recusal." Mississippi Pet. Br. at 72. Like Commissioner Richard and the Commission, we find petitioners' claim to be without merit.

Recusal is required only when the actions of a decisionmaker lead one to conclude that he has prejudged the case,

See Cinderella Career & Finishing Schools, Inc. v. *FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). Petitioners themselves acknowledge that recusal decisions are subject to a very deferential, abuse of discretion standard of review. *See* Mississippi Pet. Br. at 72 (*citing Davis* v. *Board of School Comm'rs of Mobile County*, 517 F.2d 1044 (5th Cir. 1975)). Under this standard, it is clear that Commissioner Richard acted properly.

Commissioner Richard worked for Senator Johnston from 1977 to 1981 as a legislative assistant dealing with energy issues. This fact alone does not suggest bias. As Commissioner Richard observed, "my employment with the Senator ended . . . almost one year before the *Middle South* proceedings began. I had no prior contact with the facts or legal issues involved in *Middle South* before joining the Commission in 1982." 31 F.E.R.C. (CCH) at 61,671. Petitioners do not dispute these facts. Rather, they claim that Commissioner Richard abused his discretion by "neglect[ing] to follow FERC's own Administrative Rules." Mississippi Pet. Br. at 72 (*citing* 18 C.F.R. § 385.504(c)(1), (2)). We disagree.

First, these rules do not apply to the Commissioners; they are directed only to presiding officers at hearings ordered by the Commission. Second, even if applicable, the rules would not support petitioners' claims. They provide simply that a presiding officer who believes himself to be "disqualified" may withdraw from a hearing, *see* 18 C.F.R. § 385.504(c)(1), and that the Commission may order recusal "upon good cause," *see id.* § 385.504(c)(2).

2. *Reopening the Record*

The Louisiana petitioners assert that the Commission arbitrarily and capriciously refused to reopen the record to update the cost estimates of Grand Gulf and Waterford III. We find petitioners' arguments unavailing and

hold that the Commission acted within its discretion in deciding not to reopen the record.

In *ICC* v. *Jersey City*, 322 U.S. 503 (1944), the Supreme Court established the general rule that federal courts should be extremely reluctant to require an agency to reopen a record on the ground that the evidence has become stale. *Id.* at 514. Indeed, the question is often "entrusted to agency discretion." *See Delta Air Lines* v. *CAB*, 561 F.2d 293, 307 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *accord Bowman Transp.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281 (1974). As a general rule, this court has found that a remand may be necessary "where there has been a change in circumstances . . . that is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case." *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). We cannot conclude that the circumstances cited by petitioners evidence a change which goes "to the heart of the case" or that they represent a change in the "core circumstances."

In this case, the Commission adopted Judge Liebman's remedy, which relied on the cost data in the record developed before him. In rejecting the Louisiana parties' request to reopen the record, the Commission stated: "Because cost estimates for these units have been continually changing and because the costs as well as demand projections in ER82-616 were reasonable when made and were subject to cross-examination, we find it appropriate to adopt Judge Liebman's recommendation without modification at this time." 31 F.E.R.C. (CCH) at 61,657. The Commission took the same position on rehearing, stating that "it is necessary to use some fixed point in time in order to provide finality to a proceeding, rather than continuously updating or using spot adjustments." 32 F.E.R.C. (CCH) at 61,961.

Petitioners argue that the Commission should have reopened the record on rehearing because by that time final cost figures were available for both Grand Gulf and Waterford III. Use of these costs, they argue, would have better served the interests of finality. But, updating the record would not have been as effortless as petitioners suggest. First, the intervening increase in costs cited by petitioners has never been subject to cross-examination, and AP&L, at least, suggests that the amount is subject to dispute. *See* Brief of Arkansas Power & Light Company as Intervenor at 28 n.23. Moreover, AP&L claims that the intervening improvements it has made to ANO I and II by order of the NRC would also have to be considered in any recalculation based on updated costs. Second, the Commission could not merely update cost figures; demand projections would have to be revised as well since both are necessary to properly equalize nuclear capacity costs. Thus, we cannot agree with petitioners that finality could have been better served by reopening the record. The potential delay involved might have been seriously detrimental since Grand Gulf was about to become operational and the matter had to be resolved.

Petitioners make much of the fact that the Commission considered extra-record evidence to increase the rate of return on equity it allowed MSU. "Given its willingness to consider post-record evidence in adjusting the rate of return, to benefit the utility, the FERC should have taken similar action to avoid discrimination among consumers." Louisiana Pet. Br. at 44. Petitioners' claim is unpersuasive. Setting rates of return is a completely different undertaking from allocating costs. *See Illinois Power Co.*, 15 F.E.R.C. (CCH) ¶ 61,650 (1981). In the case of the former, the Commission frequently adjusts the return upward when warranted by changing circumstances in the financial markets after the close of the record since such information is not typically subject to dis-

pute. As discussed, cost allocation involves information of a quite different character. Thus, we must conclude that petitioners have fallen "far short of demonstrating 'the most extraordinary circumstances' necessary to justify compelling the agency to reopen the record." *Nantahala Power & Light Co.* v. *FERC*, 727 F.2d at 1352 (*quoting Bowman*, 419 U.S. at 296).

For all of the foregoing reasons, the Commission's decision is

Affirmed.

BORK, *Circuit Judge, concurring in part and dissenting in part*: I concur in the majority's reasoned analysis of the jurisdictional challenges raised in this case. I dissent from the majority's affirmance of the merits of the Commission's decision because I believe that the Commission has failed adequately to explain two critical issues. I would reverse and remand for further consideration of these issues.

First, the Commission has not explained adequately its criteria for determining what is "undue discrimination" or why the course it has chosen is not also unduly discriminatory. The Commission found the UPSA as filed to be unduly discriminatory because the cost of nuclear capacity varied widely from company to company. Specifically, the Commission found the companies' costs of nuclear capacity were approximately as follows:

AP&L	$ 531,000 per megawatt
LP&L	2,211,000 per megawatt
MP&L	2,247,000 per megawatt
NOPSI	2,090,000 per megawatt

See 26 F.E.R.C. (CCH) at 65,107. Under the Commission's remedy, however, nuclear capacity costs remain vastly disparate:

AP&L	$ 858,000 per megawatt
LP&L	2,219,000 per megawatt
MP&L	2,156,000 per megawatt
NOPSI	2,094,000 per megawatt

See id. at 65,109. Those are still very large differences. Indeed, the disparities have changed hardly at all. In response to the argument that this result was also unduly discriminatory, the Commission stated:

> What our decision purports to do is to eliminate drastic rate disparities at the wholesale rate level which are associated with units used for the mutual benefit of all companies, and to do so in a manner which disturbs the historical operation of the System

> as little as possible, and which allows the individual companies to retain as fully as possible the benefits of units they have financed and constructed. In other words, we have sought to achieve an equitable balance between the interests of the individual companies and the System as a whole, consistent with the System Agreement.

32 F.E.R.C. (CCH) at 61,959.

This explanation is inadequate for three reasons. First, the Commission does not explain why the remaining very great disparities should not be considered "drastic" and hence to constitute "undue discrimination." No criteria whatever are offered for determining when such discrimination exists. Second, the argument that the Commission did not want to disturb the historical operation of the System does not support its finding because historically costs were equalized under the System. Finally, the Commission's statement that it has attempted to allow "individual companies to retain as fully as possible the benefits of the units they have financed and constructed" is unacceptable as a rationale. As discussed at length in the majority opinion, a basic, and necessary, premise of the Commission's jurisdiction in this case, as well as the validity of the decision, is that the companies are not autonomous and that decisions are made for the System as a whole. *See* maj. op. at 33-39, 66-68.

Second, I believe that the Commission's explanation for its decision to include the capacity costs of all nuclear plants, rather than considering only the costs of Waterford III and Grand Gulf, or the costs of all coal and nuclear plants, is not rational. The Commission considered the capacity costs of all nuclear plants because the unforeseen problems that led to dramatic costs overruns were "unique to constructing nuclear units." 31 F.E.R.C. (CCH) at 61,655. But the cost overruns were not unique to all nuclear plants; they were unique only to Grand Gulf and Waterford III. The investment costs of the

ANO units were comparable to the investment costs of the coal units. *See* 32 F.E.R.C. (CCH) at 61,960. Thus, if the Commission was attempting only to address the "unique" cost overruns, which it has stated as its rationale, then it would seem reasonable to consider only the costs of Grand Gulf and Waterford III. If, however, the Commission wished to include the costs of the ANO units, for some unexplained reason, then, it would appear, the Commission reasonably should have included the costs of the coal units as well.

MINUTE ENTRY
McNAMARA, J.
December 18, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MIDDLE SOUTH ENERGY, INC., ET AL	*	CIVIL ACTION
VERSUS	*	No. 85-5273
THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (2)

This matter is before the court on Motions to Dismiss the Complaint and First Supplemental and Amending Complaint pursuant to Fed.R.Civ.Proc. 12(b). As a result of the Amended Complaint herein, parties plaintiff are System Energy Resources, Inc. ("SERI") and New Orleans Public Service, Inc. ("NOPSI"); Parties defendant are The Council of the City of New Orleans, Dorothy Mae Taylor, Peggy Wilson, Johnny Jackson, Joseph I. Giarruso, James N. Singleton, Michael Early and Lambert C. Boissiere, Jr. (hereinafter collectively referred to as the Council"). The Motions, taken under advisement after counsel filed supplemental memoranda, are before the court on briefs without oral argument.

At the outset, it is important to note that as Defendants have made a "factual attack" upon this court's subject matter jurisdiction, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Evans v. Tubbe,* 657 F.2d 661, 663 (5th Cir. 1981). Moreover, it is incumbent upon Plaintiffs to prove that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980).

Having considered the extensive memoranda and attachments of counsel and the applicable law, and for reasons more fully set out below, it is the court's opinion that this action does not present a justiciable case or controversy because the issues presented are not ripe for adjudication and Plaintiff, SERI lacks the requisite standing to sue. In the alternative, the court finds that abstention under the *Burford* and *Younger* doctrines is appropriate. Accordingly, the Motions to Dismiss should be GRANTED.

I.

In the original and amended Complaints, Plaintiffs seek a preliminary and permanent injunction and a declaratory judgment directed to the Council. In the original Complaint Plaintiffs sought to enjoin the Council's ongoing investigation into the prudence of NOPSI's actions in connection with its Grand Gulf I purchase.[1] The "prudence inquiry", initiated in the context of NOPSI's pending application for permanent rate relief, is being conducted by the Council "for the purposes of determining what portion, *if any*, of NOPSI's Grand Gulf I expense shall be assumed by its shareholders, rather than passed through to its retail rate payers."[2]

By Amended Complaint, Plaintiffs narrow the scope of relief sought. They seek an injunction or a declaration only to the extent that the Council enters any order or

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[1] For a synopsis of the facts concerning NOPSI's Grand Gulf I purchase, and for a thorough discussion of the events leading up to the present controversy, see this court's Minute Entry in *New Orleans Public Service, Inc. v. The City of New Orleans, et al*, No. 85-3398, slip op. (E.D. La. September 16, 1985)(hereinafter *NOPSI I*).

[2] Council Resolution, R-85-636 (October 17, 1985)(emphasis added).

otherwise takes any action (contrary to the U.S. Supreme Court's *Nantahala*[3] decision) to require NOPSI or its shareholders to absorb all or a portion of the cost of Grand Gulf I allocated to NOPSI by the Federal Energy Regulatory Commission ("FERC") in Opinions Nos. 234 and 234-A, other than in the amount and manner previously agreed upon by NOPSI and the Council in a partial conditional settlement.[4] That is, that while the Plaintiffs continue to deny the Council's authority to conduct the prudence inquiry, they do not contest that issue here.[5] It should be noted that the Council has not attacked and does not now attack the validity or enforceability of the FERC Orders.

II.

Article III Section 1 of the United States Constitution extends the jurisdiction of the federal courts to "cases" and "controversies".[6] The case or controversy requirements, as it has developed, embraces several doctrinal theories collectively referred to under the rubic of "justiciability." Central to the instant analysis are the doctrines of standing and ripeness. As will be seen below, the line of distinction between standing and ripeness often blurs. In the case at bar, the court is of the opinion that Plaintiff SERI lacks the requisite standing to attack the validity of the Council's threatened actions and with respect to Plaintiff NOPSI, the issues presented are not ripe for adjudication.

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[3] *Nantahala Power & Light Co. v. Thornburg*, ___U.S.___, 106 S.Ct. 2349 (1986).

[4] First Supplemental and Amended Complaint, prayer for relief, at p. 20.

[5] First Supplemental and Amended Complaint, paragraph 37(d).

[6] The Declaratory Judgment Act, 28 U.S.C.§2201, applies only to "actual controversies."

A.

The court will first address SERI's standing. SERI, the principal owner of Grand Gulf I, seeks an injunction or declaration prohibiting the Council from entering any order or taking any action which would have the effect of "trapping" the Grand Gulf I costs allocated to NOPSI in the FERC Orders. SERI alleges that it faces immediate and irreparable injury in that SERI's ability to pay for Grand Gulf I depends on NOPSI's ability (i.e. solvency) to pay its share of Grand Gulf I costs, and NOPSI's solvency in turn, allegedly depends upon whether the Council enters an order "trapping" or forcing NOPSI shareholders to absorb its (NOPSI's) Grand Gulf I costs.

In order to establish standing to sue, SERI must show that it has suffered or is threatened with an injury *in fact* which is fairly traceable to the allegedly illegal conduct. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Thus, SERI must show that: 1) the Council will probably act illegally or has threatened to do so; 2) the Council action will cause NOPSI to be unable to meet its obligations to SERI; and 3) NOPSI's inability to pay SERI will probably force SERI to default on its obligations.

The court finds these claims highly speculative, at best. It is not at all clear that the Council will in fact order NOPSI to absorb additional Grand Gulf I costs. But it is even less likely and completely speculative that NOPSI will be rendered insolvent by *any* such order from the Council. The Council might order that NOPSI or its shareholders absorb additional Grand Gulf costs which will *not in fact* cause NOPSI to default on its FERC ordered

obligation to SERI. Finally, given the wide range of possible Council actions which would *not* cause NOPSI to default in its payments to SERI, the claim that the Council's actions will cause SERI to default on its Grand Gulf I obligations becomes even more attenuated. Therefore, the court finds that SERI's alleged threatened injury is speculative and not fairly traceable to the alleged threatened Council actions. As such, SERI is without standing to attack the Council's actions herein.

B.

To some extent, the same reasoning applies to the question of whether NOPSI's claims present an issue ripe for adjudication. The ripeness doctrine tests the presence of a justiciable case or controversy by inquiring "whether the case involves uncertain or contingent future events that may not occur as anticipated or indeed may not occur at all."[7] The court's analysis is performed by weighing the interest of the court in withholding review and the hardship to the parties if review is denied.[8]

At the outset, the court notes that it is not certain that the alledged illegal conduct which is the subject of the complaints will occur at all. NOPSI has shown only that the Council has threatened to enter an order forcing NOPSI to absorb additional Grand Gulf I costs. Furthermore,

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[7] 13A C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3532 at p. 112 (1984); *see also, Thomas v. Union Carbide Agricultural Products. Co.*, ___U.S.___, 105 S.Ct. 3325, 3323[sic], 87 L.Ed.2d 409 (1985); *Johnson v. Sikes*, 730 F.2d 644, 648-49 (11th Cir. 1984).

[8] Wright, Miller, Cooper, *supra* note 7, §3532 at p. 112; *Pacific Gas & Electric Co. v. State Energy Resources Counservation and Development Commission*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983); *Continental Air Lines, Inc. v. CAB*, 522 F.2d 107, 124-28 (D.C. Cir. 1975).

the Supreme Court's decision in *Nantahala*[9], which arguably prohibits this so-called "trapping" of FERC allocated costs, came down on June 17, 1986, several months after the Council began its prudence inquiry. Thus, it is not clear whether the Council intends to proceed in a manner contrary to *Nantahala*. In any case, this court will not *assume* that the Council is going to act illegally. As such, this court finds that the interests of justice would be better served by postponing review unless and until the Council in fact acts in an illegal manner.

Moreover, this court finds that there is little or no hardship to NOPSI in postponing review. NOPSI does not allege any immediate and practical impact from the Council's threatened actions. It appears that NOPSI will not be injured in any way unless and until the Council enters an illegal order.[10] Accordingly, the court concludes that the issues presented are not ripe for review and do not constitute a justiciable case or controversy within the subject matter jurisdiction of this court.

III.

But even if both parties have presented a justiciable case or controversy, this court finds that the *Burford* and *Younger* abstention doctrines militate against judicial review of those issues over which this court may have jurisdiction. The court's decision is guided (and to a large extent controlled) by the Fifth Circuit Court of Appeals opinion in *New Orleans Public Service, Inc. v. The City of*

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9 ___U.S.___, 106 S.Ct. 2349 (1986).

10 The authority of the Council to conduct the prudence inquiry and any impact on NOPSI as a result of that inquiry are *not* before the court since NOPSI, by its Amended Complaint, seeks relief only to the extent that the Council takes some action *after* or as a result of the prudence inquiry.

New Orleans, 798 F.2d 858 (5th Cir. 1986)("*NOPSI I*") which involved essentially the same parties, the same factual background and the same legal issues which are now before this court.

A.

The case of *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) and its progeny stand for the proposition that a federal court may decline to exercise its otherwise properly invoked jurisdiction to avoid unnecessary interference with a state's administration and regulation of local policy concerns. Burford abstention is particularly appropriate where: 1) the federal suit touches a state's regulation of matters of local concern which require local administrative expertise; 2) the regulatory scheme in place is complex; and 3) review of federal issues is available in state courts with the availability of ultimate review by the United States Supreme Court.

In the nearly identical *NOPSI I* case the Fifth Circuit Court found:

> [The Council's] regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District Court for the Parish of Orleans.

NOPSI I, 798 F.2d at 862. This case involves the same parties and the same regulatory scheme. Accordingly, this court will again decline to exercise its jurisdiction if such jurisdiction exists in this case.

B.

Finally, for the same reasons set out in *NOPSI I*, 789 F.2d 863-64, this court finds that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and its progeny is appropriate.[11] Accordingly,

IT IS ORDERED that the Defendants' Motions to Dismiss the Complaint and the First Supplemental Complaint be and are hereby GRANTED.

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[11] This court notes the Fifth Circuit's findings to *NOPSI I*:

> Turning our attention to these inquiries, we find that the administrative proceeding before the Council constitutes an ongoing judicial proceeding under *Middlesex* and *Ohio Civil Rights Commission*, as it is appealable to the Civil District Court for the Parish of Orleans, and is thus "within the appellate jurisdiction" of the Louisiana courts.
>
> The interest of the Council of New Orleans in setting retail rates is clearly important here: indeed, jurisdiction over retail rates is preserved to the states by the terms of the Federal Power Act. Finally, we find that through the appellate process, NOPSI would have a full and fair opportunity to litigate its federal claims. As in *Ohio Civil Rights Commission*, NOPSI cites no authority indicating that state review cannot be had of its claims. As there is no "bad faith, harassment or other exceptional circumstances" which dictate to the contrary, the district court's decision to abstain could be grounded on *Younger*.

789 F.2d at 864 (citations omitted).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MIDDLE SOUTH ENERGY, INC., ET AL	*	CIVIL ACTION
VERSUS	*	No. 85-5273
THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL	*	SECTION "D" (2)

JUDGMENT

For the reasons set out in this court's Minute Entry of December 18, 1986,

IT IS ORDERED, ADJUDGED AND DECREED that a judgment be entered herein in favor of Defendants, The Council of the City of New Orleans, Dorothy Mae Taylor, Peggy Wilson, Johnny Jackson, Joseph I. Giarruso, James N. Singleton, Michael Early and Lambert C. Boissiere, Jr., and against Plaintiffs, System Energy Resources, Inc. and New Orleans Public Service, Inc. dismissing the Complaint and the First Supplemental and Amended Complaint without prejudice, each party to bear its own costs.

New Orleans, Louisiana, this 18 day of December, 1986.

/s/ A. J. McNAMARA
UNITED STATES DISTRICT JUDGE

FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-546

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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Pursuant to Rule 22.6 of the Rules of the United States Supreme Court, *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238 (1985), and *Fusari v. Steinberg*, 419 U.S. 379 (1975), petitioner, New Orleans Public Service Inc., files this Second Supplemental Brief to call attention to a recent decision not available at the time of the last filing by petitioner.

On February 25, 1987, the Supreme Court of the State of Mississippi reversed and remanded to the Mississippi Public Service Commission that Commission's decision implementing Opinion No. 234 of the Federal Energy Regulatory Commission. *Mississippi ex rel. Pittman v. Mississippi Public Service Commission*, No. 56,762 (Miss. Sup. Ct. Feb. 25, 1987). The decision of the Supreme Court of Mississippi is unpublished at this time and

reprinted in Appendix "A" hereto.

Respectfully submitted,

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APPENDIX A

DECIDED
FEB 25 1987

IN THE
SUPREME COURT OF MISSISSIPPI
NO. 56-762
STATE OF MISSISSIPPI, EX REL; EDWIN LLOYD PITTMAN, ATTORNEY GENERAL, ET AL.

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

EN BANC

DAN LEE, JUSTICE, FOR THE COURT:

This is an appeal from an order issued by the Mississippi Public Service Commission (MPSC) on September 16, 1985, in which Mississippi Power & Light Company (MP&L) was granted the largest rate increase it has ever requested, based on the costs associated with the Grand Gulf I Nuclear Power Plant (Grand Gulf). In granting the increase, on September 16, 1985, the MPSC found that MP&L had a revenue deficiency of and granted an additional increase of $326,547,000.00, despite the fact that it had granted MP&L an increase of $44,671,544.00 in June, 1985. Collection of the $326,587,000.00 increase was ordered over a ten year period.

The Mississippi Attorney General and the Mississippi Legal Services Coalition (MLSC) have appealed, assigning as error:

1) The adoption of retail rates to pay Grand Gulf expenses without first determining that the expenses were prudently incurred;

2) Substantive *ex parte* communications between the MPSC and other parties to this cause;

3) The *ultra vires* act of the MPSC in adopting prospective rates to go into effect in the future without regard to whether they will then be just, reasonable, and nondiscriminatory;

4) The failures to join Middle South Utilities and Middle South Energy, Inc. as parties to this cause;

5) The adoption of rates without substantial evidence to support the utilization of a projected test year;

6) MP&L estoppel from seeking reimbursement of expenses greater than that originally represented to the MPSC when the Certificate of Need was issued;

7) Intervention of resident security holders;

8) Failure of the MPSC to follow procedural orders in conducting the rate hearing;

9) Adopting rates without substantial evidence of need; and

10) Allowing rates to reflect Grand Gulf costs that are not just and reasonable.

We find that Assignments 1, 4 and 7 have merit. Because MP&L and its sister and parent companies have used the judicial relationship between state and federal regulatory agencies to completely evade a prudency review of Grand Gulf costs by either agency, we reverse and remand this case to the MPSC for further proceedings.

I. THE FACTS

Middle South Utilities, Inc. (MSU) consists of four operating companies (companies that actually generate electricity) and two service companies. The operating companies are: Arkansas Power & Light Company (AP&L), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L), and New Orleans Public Service, Inc. (NOPSI). The service companies are: Middle South Services, Inc. (MSS), which provides technical and professional services to the operating companies, and Middle South Energy, Inc. (MSEI), formed in 1973 to finance the Grand Gulf project. In July, 1986, after the hearings before the MPSC in this case, MSEI changed its name to System Energy Resources, Inc. (SERI).

The operating companies all issue common, (the only voting) stock, preferred (non voting) stock, and bonds. *All* of the common stock of each operating company, however, is held by MSU. The Chief Executive Officer of MSU, by voting the common stock of each operating company, is solely empowered to elect all of the directors for each operating company, and these directors then elect the officers of their companies. One important function of the Chief Executive Officers of the operating companies is to sit on the Operating Committee, which makes major system-wide decisions. Thus, the Operating Committee's decisions are made by officers all of whom are *completely* under the control of the Chief Executive Officer of MSU.

The MSU subsidiaries operate as an integrated system. Although the companies generally own their own power plants, they pool their generated electricity. This electricity is coordinated among the operating companies in response to their needs. A dispatching facility in Pine Bluff, Arkansas, allocates the energy produced by all of the companies, with each company meeting its needs first with the lowest cost energy that it can produce. If a company needs more energy than it can produce, it is allocated higher cost energy from the other operating companies. When the entire system produces more energy than it can use, the excess energy may be sold off the system.

In addition to sharing energy, the operating companies also share in the cost of energy-producing capacity. The method of allocating the cost of capacity has changed, by agreement of the operating companies, since the construction of Grand Gulf was authorized by the MPSC in 1974, and this change is one of the primary issues of this litigation.

In 1973, MSU and its subsidiaries reached an agreement which equalized the ownership costs of generating capacity throughout the MSU system. In that agreement, companies owning capacity in excess of that required to meet their needs were referred to as "long" companies. Companies requiring additional capacity to meet their needs were referred to as "short" companies. Under the concept of equalization, short companies had to share in the costs of the generating units owned by the long companies. The short companies' allocation was calculated on the basis of the costs of the long companies' most recently installed generating units, called "participation units."

When the 1973 System Agreement became effective, MSU was planning the Grand Gulf Nuclear Station. The original plan was to build one nuclear plant at the Grand Gulf site, under the management and control of MP&L, and one plant in Louisiana, under the control of NOPSI. However, the NOPSI site proved unsuitable, and MP&L, alone, could not finance a nuclear generating plant; therefore, MSEI (now SERI) was formed to provide financing for two nuclear generating plants at Grand Gulf.

In 1974, the MPSC issued its "Order Granting Certificate of Public Convenience and Necessity" authorizing the construction of Grand Gulf. MSEI, the actual owner of the proposed two-unit facility, joined MP&L as a petitioner. The Order reflected the understanding of all of the parties involved that the 1973 Agreement would be amended to include MSEI as a party.

We cannot stress enough the implications of this agreement embodied in the 1974 Order. MSEI is not an operating company; therefore, it does not require any generating capacity for itself. Under the 1973 Agreement, it would always be a long company, with excess capacity to allocate among the short companies. Grand Gulf, its most recently installed generating unit, would become MSEI's participation unit, from which the costs to the short companies would be calculated.

At the time that the Certificate of Need was granted, it was projected that Mississippi's demand for power would increase to the point where MP&L would utilize about 38% of Grand Gulf. That demand has not materialized, and MP&L remains a long company. Under the 1973 Agreement, it would not be required to share in the allocation of costs of Grand Gulf unless and until it required

additional capacity to meet its needs. Even if the increased consumption had materialized however, and MP&L had become a short company, it would have had to pay costs associated with Grand Gulf only to the extent that it required additional capacity.

In the later 1970's, MSU management began to have concern about the 1973 Agreement. Since the demand forecasts showed that MP&L and AP&L were long companies, and would remain so for some time, they would not need to purchase capacity until the planned nuclear plants had been greatly depreciated. Thus, they would not be required to bear the brunt of the costs of nuclear construction, as would the short companies. MSU's Operating Committee, consisting of the Chief Executive Officers of AP&L, LP&L, MP&L and NOPSI, studied the situation for several years, and, in the 1980, voted to adopt a new system agreement.

The new agreement, referred to throughout these proceedings as the 1982 System Agreement, eliminated the participation unit concept. Instead, the companies were to implement the use of "intermediate Generating Units," defined as oil and gas burning units, to allocate the cost of capacity. The rationale for the change was as follows: Nuclear units, with their high fixed costs and low fuel costs, are run around the clock to provide the operating companies with base capacity. Oil and gas units, with their low fixed costs and high fuel costs, are primarily operated to provide reserve capacity: for instance, on hot summer days. Thus, excess capacity is more likely to have come from the operation of oil and gas burning, rather than nuclear, generating units. The effect of this change was that capacity allocated to companies in the MSU system was calculated on the cost of the generating oil and gas

units, at a fraction of the cost of nuclear energy.

MSEI had no oil and gas burning units and was not a party to the 1982 System Agreement. It required however, a methodology for the allocation of the cost of the nuclear capacity at Grand Gulf. To that end, MSEI entered ento a Unit Power Sales Agreement (UPSA) with the operating companies. The UPSA allocated Grand Gulf I among the operating companies as follows:

LP&L	38.57%
MP&L	31.63%
NOPSI	29.80%
AP&L	0.00%

The UPSA was not filed with the MPSC. However, it was filed with the Federal Energy Regulatory Commission (FERC) in Docket No. ER82-616-000. The 1982 System Agreement was filed with the FERC in Docket No. ER82-483-000.

At about the same time that they agreed on the UPSA, the MSU operating companies and MSEI entered into a Power Purchase Advance Payment Agreement. This agreement provided that the companies would pay MSEI in advance for Grand Gulf power. The payments, which totaled $12,500,000.00 per month for all of the companies, were to be made from January, 1984, through December, 1985, or whenever Grand Gulf became operational. Eighteen payments were made under this agreement; MP&L paid 33% of the total. The agreement provided that on the date that Grand Gulf became operational, and for eleven months thereafter, the companies would be reimbursed for 4% of the outstanding balance of the advance. The companies would get 8 ⅔% for the next six months, and then the balance. MP&L's share of the agreement may be

calculated as follows:

> $12,500,000.00/month X 18 months = $225,000,000.00 (the total amount of payments)
>
> $225,000,000.00 X 33% = $74,250,000.00 (MP&L's share of the total payments)
>
> $74,250,000.00 X 4% = $2,970,000.00 (first reimbursement to MP&L)

The last figure would be adjusted upward for interest accrued on the funds advanced to MSEI. The actual rebate to MP&L on its first Grand Gulf bill was $3,232,727.41.

In 1984, FERC Administrative Law Judge Liebman issued his opinion in ER82-616-000, which dealt with the UPSA filing. He found the Grand Gulf allocation under the UPSA to be unjust and unreasonable, as was the proposal made by the MPSC to return to the 1973 Agreement and make Grand Gulf a participation unit. In order to allocate the costs of nuclear power throughout the MSU system, he ordered the following allocation for Grand Gulf 1:

LP&L	14%
MP&L	33%
NOPSI	17%
AP&L	36%

On February 4, 1985, FERC ALJ Head issued his order in ER82-483-000, which dealt with the 1982 System Agreement filing. He ruled that Grand Gulf was an anomaly in the MSU system that should be allocated among the operating companies, with the allocation fluctuating from

year to year, based on each company's demand for system energy. The effect of that decision would be to allocate approximately 14% of Grand Gulf to MP&L.

In November, 1984, when the operational status of Grand Gulf became imminent, MP&L filed for the rate increase which is the subject of this case. In addition to the Grand Gulf expense, MP&L sought a rate increase for the purchase of part of the Independent[sic] Steam Electric Station Unit 2 (ISES2), a coal-burning plant located in Arkansas. MP&L bought 25% of the ownership, and 31.5% of the capacity of the plant, which was owned by a sister company, AP&L. It is agreed by all of the parties to this appeal that this purchase will result in lower fuel costs, which will be passed on to consumers through the fuel adjustment clauses in their bills. A rate hearing was held on January 15, 1985, for interim rates for the ISES2 purchase, and, on January 17, the MPSC issued an interim order granting approximately $45 million in increased revenues associated with ISES2. This order is not at issue in this appeal, except to the extent that it adds to the excess capacity imposed upon MP&L by the Grand Gulf allocation.

The primary objection to the allocation of Grand Gulf to MP&L is that Mississippi ratepayers simply do not need the energy generated by the plant. In fact, we cannot utilize this excess capacity until the mid-1990's, if ever. Frank Gallagaher, an MP&L witness, testified that with the addition of ISES2 but *before the Grand Gulf allocation,* MP&L had a reserve capacity of *85% over peak demand.* Both Gallagher and Lewis Perl, another MP&L witness, testified that the approximate reserve margin was 30-35%. MP&L represented to the MPSC that the reserve capacity

figures are unimportant, because the ratepayers only support the capacity that MP&L cannot sell off the system. Nevertheless, should MP&L be unable to peddle its excess energy to other companies, (which is the case now) Mississippi ratepayers would have to support over 100% more capacity than they can use.

On March 5, 1985, the MPSC issued an order severing the issue of prudency from the rate increase "to be heard at a later date." On April 30, the MPSC, the Attorney General, the MLSC and MP&L entered into a stipulation regarding the revenue requirements associated with the requested rate increase as to issues only. This stipulation specifically excluded the issues of prudency and excess capacity, because it had been severed by commission order on March 3, 1985.

The MPSC held another hearing on May 21, 1985. At that time, Grand Gulf 1 was expected to (and ultimately did) come on line July 1, 1985, at a kilowatt hour cost roughly equivalent to $72-85/barrel for oil. The company testified that the first bill from MSEI for Grand Gulf was expected on August 5, 1985, and, without a rate increase, MP&L could only afford to make the payment to MSEI through November. After that, MP&L would have to curtail activities or attempt to raise the money through an equity offering. The issue of bankruptcy was discussed, and later rejected, as an alternative.

MP&L proposed a plan where revenues for the Grand Gulf expense would be recovered over a ten-year period. This plan was drawn in accordance with the UPSA allocation of Grand Gulf of 31.63%, although MP&L testified that its litigation position before the FERC was aligned

with Judge Head's allocation of 14½%. The "rate moderation plan" would allow MP&L to bill its customers at less than the Grand Gulf cost for its first five operational years, and recover the difference in the next five years. The theory behind the plan was to allow MP&L to defer part of the cost of Grand Gulf that would normally have to be recognized on its financial statements as expenses. This deferral would allow the statements to reflect acceptable earning levels, so that the company could issue stocks and bonds to finance the difference. The rate moderation plan was drawn in accordance with MP&L's understanding of the requirements of Financial Accounting Standards Board (FASB) Statement No. 71, pertaining to the deferral of utility costs. (We note, in passing, that the ten-year plan is derived from a proposed amendment to FASB No. 71, and some accounting professionals have taken the position that such deferrals should be spread over the life of the plant. In this case, the revenues could be collected over the life of Grand Gulf, which is estimated to be forty years.) The plan proposed by MP&L also included provisions for low use customers and senior citizens, and provided for an annual "true up" of expenses.

On June 13, 1985, the FERC issued Opinion 234, affirming Judge Liebman's Grand Gulf allocation of 33% to MP&L, and rejecting Judge Head's allocation of 14½%. This opinion was eventualy affirmed by a 2-1 vote of the Court of Appeals for the District of Columbia Circuit. *Mississippi Industries v. Federal Energy Regulatory Commission*, No. 85-1611, decided Jan. 6, 1987, not yet reported. Justice Bork dissented from the majority opinion, and would have held that FERC's allocation did not appear to remedy the alleged undue discrimination among the generating costs of nuclear energy of the operating companies.

On June 14, 1985, the MPSC granted a rate increase to MP&L for the ISES2 costs of $44,671,544.00. However, in allowing the increase, the Commission stated:

> The matter of excess capacity on the Company's system and the Middle South System as a whole continues to be of great concern to this Commission. While the interim rate relief granted in this order attributable to additional capacity is represented by Independence Unit 2, *this Commission expressly reserves all its rights to examine and investigate indepth [sic] the excess reserve or excess capacity issue* in further proceedings in this cause, and take such action in granting permanent relief as may be approximate. [emphasis added]

On the issue of Grand Gulf relief, however, the Commission held that MP&L had failed to meet its burden of proof. Specifically, the MPSC found that MP&L's change in allocating Grand Gulf expense precluded it from seeking the increased rates. The Commission stated that, as the state regulatory agency, it should be entitled to rely on the company's prior representations. Thus, the requested rate increase for Grand Gulf was denied.

After this order was issued, the parties engaged in settlement negotiations. Presented in these discussions was a proposal that MP&L currently recognize 22% of its 33% Grand Gulf allocation, while deferring the remaining 11%. No agreement could be reached. Eventually, the MPSC granted a rehearing on the Grand Gulf rate relief which it had denied on June 14, 1985.

On July 1, 1985, Grand Gulf Unit 1 came on line, causing MP&L to begin incurring unrecovered costs of

about $906,000.00 per day. On July 26, MP&L applied for temporary emergency rates, claiming that the Grand Gulf bill would cause its net income to become negative in September. The first bill for Grand Gulf, of approximately $27 million, was sent to MP&L on August 7.

The MPSC held a hearing on the temporary rate increase on August 12, 1985. Company witnesses testified that MP&L's deteriorating financial position had caused its bond ratings to be lowered below investment grade. However, the company had not, at that time, cancelled any preferred dividends.

On August 22, 1985, pursuant to an agreement between the MPSC and the federal court, the matter was set for a rehearing. By that time, MP&L's cash situation had declined precipitously, due to the unexpected cancellation of lines of credit with local banks. At the rehearing on September 9, the company testified that it had no external sources of financing.

The MPSC issued its Final Order on September 16, 1985, granting the $326 million rate increase. The order provided for recovery of Grand Gulf costs in a plan similar to the rate moderation plan originally proposed by MP&L. For the first 10 years of the plan, MP&L would inventory ⅓ of its 33% Grand Gulf allocation, with recovery of the deferred amount beginning in 1995. Of the 22% then allowed, 7.5% would be inventoried for the first three years. The net effect of the plan is illustrated by the following table:

Year	FERC Allocation		10-Year Inventory		Current Recovery		3-Year Inventory		Net Current Recovery
1	33%	-	11%	=	22%	-	7.5%	=	14.5%
2	33	-	11	=	22	-	7.5	=	14.5
3	33	-	11	=	22	-	7.5	=	14.5
4	33	-	11	=	22				22.0
5	33	-	11	=	22		recovery		22.0+
6	33	-	11	=	22		of		22.0+
7	33	-	11	=	22		7.5%		22.0+
8	33	-	11	=	22		over		22.0+
9	33	-	11	=	22		years		22.0+
10	33	-	11	=	22		5-10		22.0+

11 Recovery of 11% over life of plant.

The amount allowed as "Net Current Recovery" would be further reduced in the first three years pursuant to a phase-in schedule. The order also provided that MP&L could recover currently the incremental cost (e.g., interest on bonds) of financing the deferred inventory amounts. The ultimate cost to the consumer is as follows:

Year	Annual Increase Ordered	Cumulative Increase Over 1984 Rates
1985-86	14.07%	14.07%
1986-87	8-10%	22-24%
1987-88	8-10%	30-34%
1988-89	7-8%	37-42%
1989-90	7-8%	44-50%

I. PRUDENCY

Miss. Code Ann. §77-3-39 (1972) authorizes the MPSC to establish just and reasonable rates which lead to a fair rate of return for the utility. As we have often held, "A fair rate is one which, *under prudent and economical management,* is just and reasonable to both the public and the utility." *Miss. Public Service Commission v. Miss. Power Co.,* 429 So.2d 883 (Miss. 1983), (citing *Southern Bell Tel. & Tel. Co. v. Mississippi Public Service Comm'n,* 237 Miss. 157, 241, 113 So.2d 622, 656 (1959) [emphasis added].

What appears to have taken place here is the evasion by sister MSU companies of any review of the prudency of their operation or the fairness of their many "in house" dealings. The C.O.N. to construct Grand Gulf was granted under a specific set of circumstances: the first unit was to be operational in 1980, the two units were to cost $1,227 billion, and Mississippi ratepayers were not to pay for any more of its capacity than they needed. Unit 1 began operation in July, 1985; the cost of Unit 1, alone, was over $3.5 billion; and the MSU-controlled operating companies agreed, *among themselves* that Mississippians should pay for ⅓ of its cost--much of Grand Gulf was even paid for in advance of receiving one kilowatt of power from the plant. Now MP&L presents us with this rate increase as a fait accompli, and demands that we affirm it, because the FERC has determined that a 33% allocation of Grand Gulf to MP&L does not discriminate among the various sister operating companies. We do not interpret the law to require that we approve the blind pass-through of a $326 million rate increase to Mississippians without a prudency review; to do so would be a gross abdication of the responsibility of state regulators.

Predictably, MP&L relies heavily on the decision of the United States Supreme Court in *Nantahala Power & Light Co. v. Thornburg*, ___U.S. ___, 106 S.Ct.2349, 90 L.Ed.2d 943 (1986). In that case, the FERC had allocated a certain amount of low cost TVA-supplied hydroelectric power to Nantahala Power & Light Company. The FERC allocation slightly adjusted an agreement between Nantahala and Tapoco, Inc., both wholly owned subsidiaries of Alcoa. Nantahala's retail customers were all North Carolina residents, and the North Carolina Utilities Commission (NCUC) rejected this allocation in its setting of rates for Nantahala. The NCUC set rates as if Nantahala were receiving more of the low cost power than it was allocated. Although the FERC allocation was ultimately approved by the United States Court of Appeals for the Fourth Circuit, the North Carolina Supreme Court affirmed the utility commission's action. The United States Supreme Court reversed.

The Supreme Court's opinion reiterated the exclusive jurisdiction of the FERC to set interstate wholesale rates. Since the allocation of low cost power directly affected Nantahala's rates, the Court held that "The fact that NCUC is setting retail rates does not give it license to ignore the limitations that FERC has placed upon Nanatahala's [sic] *available sources* of low-cost power." ___ U.S. at ___, 106 S.Ct. at 2358, 90 L.Ed.2d at 956.

We are aware of the effect that wholesale rates have on retail rates, and we do not challenge the FERC's jurisdiction over interstate wholesale rates. We do not, however, construe *Nantahala* as forcing the MPSC to set rates based on the construction and operation of a plant (nuclear or otherwise) that generates power that is not

needed at a price that is not prudent. If MP&L had built Grand Gulf on its own, and then come to the MPSC asking for a rate increase based on its cost, no one would seriously argue that the commission would have the authority, indeed, the duty, to inquire into the prudency of its cost. MP&L, however, asks us to take the position that, because Grand Gulf is owned by an out-of-state corporation, the Supremacy clause of the United States Constitution precludes any such review of Grand Gulf, and forces its unneeded power down the throats of Mississippi ratepayers. We do not believe the preemption doctrine was ever intended to accomplish such an inequitable and unjust result.

Important factual distinctions exist between this case and *Nantahala*. In *Nantahala*, no question was raised about the prudency or necessity of acquiring low-cost hydro-electric power. The Supreme Court recognized this, stating:

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive *if lower-cost power is available elsewhere*, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*.

___ U.S. at ___, 106 S.Ct. at 2360, 90 L.Ed.2d at 958.

In this case, there is no doubt that Mississippians do *not* need the power provided by Grand Gulf, and that lower cost power is available elsewhere (in fact, by plants owned by MP&L). The record indicates that MP&L still serves 61% of its electrical generating needs from oil and gas units, and, with the purchase of coal-generated energy from ISES2, the company is at 85% *over peak demand*. Furthermore, MP&L admitted at oral argument that it is selling

the less expensive energy off the system and retaining the electricity allocated to it from Grand Gulf. The Grand Gulf electricity is estimated to have a busbar, or total generation, cost of 15‘ per kilowatt hour, compared to an average busbar cost of 4‘ for non-Grand Gulf power. Donald Lutken, the Chief Executive Officer of MP&L, testified that the company has the highest average kilowatt hour cost of the MSU system. In light of these facts, clearly the allocation of 33% of Grand Gulf power is unreasonably excessive. Since Mississippi cannot use 33% of Grand Gulf's power, the 1982 System Agreement providing for the allocation of 33% of its cost would seem to be imprudent.

The 1982 System Agreement is not the only action between MSU subsidiaries that gives us pause. The Power Purchase Advance Payment Agreement is another example of less-than-arm's-length transactions between these sister companies. We can see no benefit accruing to MP&L by entering into the agreement to pay over $74 million to MSEI in advance of receiving any power from Grand Gulf. On the contrary, this agreement could only benefit MSU and MSEI by providing funds for construction work in progress at Grand Gulf, in circumvention of our long established doctrine preventing the use of funds to finance construction work in progress from being allowed in the rate base as a basis for increase for rates. *Mississippi Public Service Commission v. Coast Waterworks, Inc.,* 437 So.2d 448 (Miss. 1983); *State, ex rel; Allain v. Mississippi Public Service Commission,* 435 So.2d 608 (Miss. 1983); *Mississippi Public Service Commission v. Mississippi Power Company,* 429 So.2d 883 (Miss. 1983). This agreement becomes especially suspect in light of the fact that it was entered among companies whose officers are controlled by MSU, the holder of all of their voting stock.

In sum, we believe that the relationship of MP&L to MSU, MSEI, and the other operating companies has brought about a situation in which Mississippi ratepayers are being intolerably burdened with high-cost nuclear energy that they neither want nor need nor can afford.

In holding that a prudency review is not precluded by federal law, we adopt the following language from *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696 (N.H. 1985):

> The approach of this modern trend, which we here adopt and approve as being consistent with preemption doctrine applicable to State regulation of retail electric rates, is to examine whose matters *actually determined*, whether expressly or impliedly, by the FERC. As to those matters not resolved by the FERC, State regulation is *not preempted provided that* State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved.

Id. at 704.

Several aspects of prudency have never been addressed with respect to Grand Gulf, either by state or federal authorities. Specifically, we have yet to see MP&L, MSEI or MSU justify putting Grand Gulf on line at its exorbitant cost to ratepayers. At no point in the regulatory hearings related to Grand Gulf have we found evidence from MSU or its subsidiaries of alternatives to putting Grand Gulf on line. The FERC allocations presuppose an operational Grand Gulf, delivering at, or near, full capacity. That agency was never presented with the question of whether the completion of Grand Gulf, or its continued operation, was

prudent. *Mississippi Industries v. Federal Energy Regulatory Commission*, No. 85-1611 (D.C. Cir. Jan 6, 1987) stated the issues reviewed by the FERC:

> The principal issue in ER82-616 was whether the UPSA's proposed allocation of Grand Gulf investment costs was reasonable, and, if not, how such costs should be allocated. . . . The principal issue in the System Agreement proceeding was whether FERC should approve that Agreement as filed or whether it should equalize all of part of the production costs on the system.

Id., slip opinion at pp. 20-21, 23.

Surely, it became obvious to MSU management, at least by the early 1980's, that both the cost and demand projections related to Grand Gulf were terribly incorrect. No regulatory review was made at that point, however, and management proceeded doggedly along. The Court of Appeals recognized this folly in its synopsis of the facts of this case:

> The Grand Gulf project was initiated by MSU to meet the then projected demand for electricity by the *system as a whole*. 26 FERC at 65, 101-12. By the late 1970's however, it became clear that projected demand would fall well short of previous expectations. Nonetheless, MSU continued to build Grand 1 on the assumption that the overall cost per kilowatt hour would be less than that of alternative energy sources. 26 FERC at 65,102.[23]

[23]This assumption is now questionable.

> Through the 1990's Grand Gulf will *not* produce energy that is cheaper than energy produced from alternative sources. Indeed, ALJ Liebman estimated that by 1993 ratepayers will *pay $3 billion more for Grand Gulf energy than they would for energy from comparable sources.* As of 1984 MSU was still predicting that Grand Gulf power would become economical at some future date and that at some (even later) point the project will represent a net benefit to consumers. 26 FERC at 65, 103. As ALJ Liebman noted, however, the decline in the price of oil makes these projections appear rather dubious. *Id.*

Mississippi Industries, slip opinion at 16-17. However, the court made no finding with regard to prudency *because the issue was not presented.* Now that Grand Gulf is complete, at over three times its projected cost, and clearly unnecessary for the purpose of generating electricity for Mississippians, MP&L thinks that it can evade a prudency review of Grand Gulf because the plant is owned by an interstate wholesaler, which, incidentally, is wholly owned and controlled by MSU, as is MP&L. We disagree.

In remanding this case to the MPSC for a review of the prudency of the Grand Gulf investment, we rely on the expertise of this agency in making a determination of whether MSU and its subsidiaries made reasonable decisions *in light of local conditions.* We believe that this is a matter best left to this state agency to resolve, and that this issue had not been preempted by federal jurisdiction over interstate wholesale ratemaking. We, thus, agree with the following language of the Court of Appeals for the Fifth Circuit, applying the abstention doctrine of *Burford v. Sun Oil Co.,* 919 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.1424 (1943):

> Given the facts before us and the structure of the Federal Power Act, which leaves jurisdiction over retail rates to the states, we conclude that the district court did not abuse its discretion in finding *Burford* abstention appropriate here. As with the regulatory scheme at issue in *Burford*, the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District Court for the Parish of Orleans. Significantly, NOPSI has not denied that adequate state court remedies exist. That the state courts often capably address claims such as that raised by NOPSI is apparent from the number of state court cases upon which NOPSI relies to prove its preemption claim substantial. Nor would federal abstention foreclose the United States Supreme Court from entertaining NOPSI's preemption claim should it wind its way up through the state courts, as is demonstrated by the path of the recent *Nantahala* case.

New Orleans Public Service v. City of New Orleans, 798 F. 2d 858, 862 (5th Cir. 1986). *See also Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3rd Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985).

We thus hold that the state regulatory body, in this case, the Mississippi Public Service Commission, must review the prudency of an investment such as Grand Gulf before it can enact rates based on its cost. Such a review

must determine whether MP&L, MSEI and MSU acted reasonably when they constructed Grand Gulf 1, in light of the change in demand for electric power in this state and the sudden escalation of costs.

II. FAILURE TO JOIN MSEI AND MSU AS PARTIES

MSU, as the owner of all of the voting stock of its operating companies, obviously controls them, as well as MSEI. The evidence shows that MP&L entered into two contracts with its sister companies--the UPSA and the advance payment agreement--which were advantageous to its sister companies and detrimental to MP&L. The result of these agreements was the August Grand Gulf bill for approximatgely[sic] $27 million, presented to the MPSC as evidence of the emergency need for increased rates. The substance of the bill was as follows:

To bill you for cost of service for July, 1985	$30,092,473
Less Purchase Power Advance Payment Credit	3,199,397
Net Payment	26,893,076

The MPSC was acutely aware in this case that it was dealing with transactions that were not arm's-length, yet it accepted as evidence of the reasonableness and prudency of Grand Gulf costs this bare-bones invoice. This is directly contrary to the rationale of *Western Distributing Co. v. PSC*, 285 U.S. 119, 52 S.Ct. 283, 76 L.Ed. 655 (1931), which held that state authorities had the right, despite federal regulation, to inquire into transactions between a controlling corporation and its subsidiary:

> The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to fairness.

285 U.S. at 124-25, 52 S.Ct. at 284, 76 L.Ed. at 658. We do not read *Nantahala* to the contrary, although it cited with approval several cases involving purchases by closely related entities. The Court noted that "FERC's regulation still preempted review by state utility commissions of FERC approved *rates.*" ____U.S. at ____, 106 S.Ct. at 2356, 90 L.Ed. at 953-54. Neither the UPSA, which allocated more capacity to this state than it will be able to use until the mid-1990's, if ever, nor the Power Purchase Advance Payment Agreement, which was merely a conduit of construction financing from MP&L to MSEI, fall under the category of FERC approved rates. The MPSC had the authority, indeed, the duty, to inquire into the prudency of these suspect agreements.

Such a review could only be effective if MSU and MSEI (now SERI) were joined as parties. Motions were made for such a joinder and denied by the Commission. We hold that these parties should be joined in the prudency review to be accomplished on remand of this case, in order to accomplish a complete review of the transactions between MP&L, MSEI, and MSU, and their effect on Grand Gulf expense.

III. INTERVENTION OF MSU RESIDENT SECURITY HOLDERS

The only statutory basis for intervention in these proceedings is found in Miss. Code Ann. §77-3-37(9), which allows intervenors and protestants to file direct testimony and exhibits with the MPSC. We believe that the intervention allowed in this case was error, for two reasons.

First, the security holders were already a party to these proceedings through the officers of MP&L. Shareholder intervention is improperly granted where there is no showing, as here, that the shareholders' interests are not being adequately represented. *Brieterman v. Elmar Properties, Inc.*, 507 N.Y.S. 2d 206 (N.Y.A.D.2d 1986); *Lipton v. News Intern, FLC*, 514 A.2d 1075 (Del. Supp. 1986).

Second, even under Rule 24(a)(2), Miss. R. Civ. P., intervention is only allowed under certain circumstances:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.* [emphasis added]

See Guaranty National Insurance Co. v. Pittman, decided January 14, 1987 (not yet reported), slip opinion at p. 5. Here, the applicants' interest was obviously the preservation of their stock value through the award of a rate increase to MP&L. That interest was coexistent with MP&L's desire to enhance its financial position by obtaining a rate increase. Thus, the intervenors' interest was

adequately represented by MP&L, a party to the action, and intervention of the resident security holders was improper under the facts in this case.

We, thus, find reversible error in the proceedings below, and we reverse and remand this case to the Mississippi Public Service Commission for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

WALKER, C.J., ROY NOBLE LEE AND HAWKINS, P.JJ., AND PRATHER, SULLIVAN, ANDERSON AND GRIFFIN, JJ., CONCUR. ROBERTSON, J., DISSENTS.

DECIDED
FEB 25 1987

IN THE SUPREME COURT OF MISSISSIPPI
NO. 56,762

STATE OF MISSISSIPPI, EX REL. EDWIN LLOYD PITTMAN, ATTORNEY GENERAL, ET AL.

V.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

ROBERTSON, JUSTICE, DISSENTING:

I respectfully dissent. I am of the view that our decision this day is in an area wholly preempted by authority granted by the Congress to the Federal Energy Regulatory Commission. *Nantahala Power & Light Co. v. Thornberg,* 476 U.S. ____, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986); *see also Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board,* 474 U.S. ____, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986).

Supreme Court, U.S.
FILED
MAR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-546

In the Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.
Petitioner,

VERSUS

THE CITY OF NEW ORLEANS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S THIRD SUPPLEMENTAL BRIEF

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PETITIONER'S THIRD SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6 of the Rules of the United States Supreme Court, *Tiverton Board of License Commissioners v. Pastore,* 469 U.S. 238 (1985), and *Fusari v. Steinberg,* 419 U.S. 379 (1975), petitioner, New Orleans Public Service Inc., files this Third Supplemental Brief to call attention to a recent decision not available at the time of the last filing by petitioner.

On March 4, 1987, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Southern District of West Virginia in *Appalachian Power Company, et al. v. Public Service Commission of West Virginia, et al.,* No. 86-2540 (4th Cir. March 4, 1987) holding that the doctrine of preemption bars a prudence inquiry by a state regulatory body. The decision of the United States Court of

Appeals for the Fourth Circuit is unpublished at this time and reprinted in Appendix "A" hereto.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2540

Appalachian Power Company; American Electric Power Company, Inc.; Kentucky Power Company; Columbus and Southern Ohio Electric Co.; Indiana & Michigan Electric Company; Ohio Power Company,

Appellees,

versus

Public Service Commission of West Virginia; Otis D. Casto, as a member of Public Service Commission of West Virginia; Michael D. Greer, as a member of Public Service Commission of West Virginia,

Defendants,

and

Consumer Advocate Division of the West Virginia Public Service Commission,

Appellant.

Federal Energy Regulatory Commission,

Amicus Curiae.

No. 86-2541

Appalachian Power Company; American Electric Power Company, Inc.; Kentucky Power Company; Columbus and Southern Ohio Electric Co.; Indiana & Michigan Electric Company; Ohio Power Company,

Appellees,

versus

Public Service Commission of West Virginia; Otis D. Casto, as a member of Public Service Commission of West Virginia; Michael D. Greer, as a member of Public Service Commission of West Virginia,

Appellants,

and

Consumer Advocate Division of the West Virginia Public Service Commission,

Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge. (CA 85-98)

Argued December 12, 1986. Decided March 4, 1987

Before PHILLIPS and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Richard E. Hitt; Billy Jack Gregg (Mark G. Thessin on brief) for Appellants; Charles McElwee; Jerome M. Feit (William C. Porth, Robinson & McElwee; A. Joseph Dowd; Edward J. Brady; Kevin F. Duffy on brief) for Appellees; (William H. Satterfield, General Counsel; Jerome M. Feit, Solicitor; Joanne Leveque on brief) for Amicus Curiae.

PHILLIPS, Circuit Judge:

Appalachian Power Company, Inc. (APC), its parent, American Electric Power Company, Inc. (AEP), and their various affiliates[1] filed suit in the United States District Court for the Southern District of West Virginia seeking declaratory and injunctive relief against the Public Service Commission of West Virginia (PSC)[2] regarding a December 28, 1984, PSC order. The complaint alleged that the PSC order violated the supremacy clause of the United States Constitution insofar as it asserted state authority to scrutinize an agreement allocating among utility companies operating in several states the cost burdens of an interstate energy transmission network. The power companies argued that scrutiny of the agreement is a matter exclusively reserved to the Federal Energy Regulatory Commission (FERC) by subchapter II of the Federal Power Act (FPA), 16 U.S.C. § 824 et seq. and thus that state authority is preempted by that Act. They additionally challenged the PSC order as violative of the interstate commerce and due process clauses of the constitution. In granting the companies' motion for summary judgment, the district court found violations of both the supremacy clause and the interstate commerce clause and declined to consider the due process claim. We agree that the PSC's

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[1] The other AEP subsidiaries joined in the complaint in this case were Kentucky Power Company, Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, and Ohio Power Company.

[2] The PSC, a state agency created by the West Virginia legislature, regulates the practices, services, and rates of public utilities operating in West Virginia. A prime function of the PSC is to protect the interests of the consuming public, in particular to ensure that the retail rates charged for utility services are just and reasonable. W. Va. Code § 24-1-1 (1986).

assertion of authority is preempted by the FPA, that FERC has exclusive jurisdiction to consider the merits of the interstate agreement. As did the district court, we decline to consider the due process claim and additionally do not measure the impact of the challenged PSC order upon interstate commerce.

I

APC, an electric generating company selling power to residential, commercial, and industrial customers throughout the states of Virginia and West Virginia, is a member of a highly integrated network for the transmission of electricity in interstate commerce. The network is comprised of a parent holding company, AEP, and various utility companies, such as APC, located in several states and wholly owned by AEP. These affiliated utilities are interconnected by means of an extra-high voltage (EHV) interstate electric transmission system over which energy can be transmitted in bulk from one location to another. The network stretches some four hundred miles from the Illinois border in the west to the Pennsylvania border in the east, and some five hundred miles from southwest Michigan in the north to the North Carolina border in the south. The system is operated with central dispatch, the least-cost units being operated first to permit the most economical use of the system as a whole. Each constituent company is subject to both FERC regulation pursuant to the FPA, 16 U.S.C. § 824 *et seq.*, and to regulation by the utility commission in its state of operation, *e.g.*, W. Va. Code ch. 24 (1986). APC is the only affiliate subject to regulation by the West Virginia PSC.

Traditionally, each constituent company has owned,

maintained, and borne the entire cost of that portion of the EHV lines located in its state or designated service area.[3] This arrangement began to change on April 1, 1984, when the AEP companies entered into the Transmission Equalization Agreement (TEA), which allocates costs according to a formula that accounts for the demand each company places on the system. Under the TEA, those members of the system whose actual investments in the transmission network exceed their share of the total AEP system investment are deemed "surplus" members, and those having an investment less than their share of the total are "deficit" members. Through monthly equalization payments, the TEA anticipates that "deficit" companies will make payments to "surplus" companies. As a "deficit" company, APC's share of costs for the EHV system under the TEA are greater than under the former arrangement.

Pursuant to the FPA, which gives FERC jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce and the facilities for such transmission, 16 U.S.C. § 824(b)(1), the utility companies submitted the TEA for FERC approval on March 29, 1984. On August 21, 1984, FERC accepted the agreement for filing as a rate schedule and provided that it would become effective January 22, 1985, subject to refund if thereafter FERC found the terms of the TEA unjust or unreasonable. The PSC and the Consumer Advocate Division of the Public Service Commission of West Virginia (CAD) both intervened in the FERC proceedings. FERC's decision on the

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[3] One exception to this cost allocation was a 1958 agreement in which four AEP companies, including APC, shared the costs of transmission facilities in Indiana. APC at that time sought and obtained PSC approval of the agreement, acquiescing without question to the same PSC authority contested by APC in this case.

merits of the TEA is still pending.

In a state retail rate setting case, APC requested that the PSC allow APC's retail rates to reflect the costs incurred under the TEA. On September 28, 1984, the PSC agreed to pass the TEA costs to APC's customers, subject to refund if FERC, in the pending proceedings, found the TEA unjust or unreasonable. In its September 28 order, the PSC deferred to FERC because it believed state consideration of the TEA's merits was preempted by federal law. In a reconsideration of the September 28 order, prompted by a request from the CAD, the PSC reversed its position on the preemption issue and decided that APC did have to submit the TEA for PSC approval, pursuant to W. Va. Code § 24-2-12(f), which requires state approval of contracts among affiliated utility companies. In a revised order entered on December 28, 1984, the PSC also denied APC retail rate recovery of $1.6 million in costs incurred under the agreement, pending the required PSC approval.

APC and its affiliates instituted this action on January 18, 1985, challenging the December 28 order and seeking declaratory and injunctive relief. APC claimed that the PSC's authority to consider the TEA was preempted by the FPA. APC also alleged that the December 28 order impermissibly burdened interstate commerce and violated the due process clause. The CAD intervened on the side of defendants.

In an effort to clarify the jurisdictional issue upon which the efficacy of its December 28 order depended, the PSC filed a motion with FERC on March 19, 1985, requesting that FERC limit its consideration of the TEA to whether the terms of the agreement were just and

reasonable and determine what regulatory body has power to assess the "prudence" of the agreement. The isolated "prudence" inquiry, which the PSC asserts authority to make, focuses upon whether a company such as APC made a prudent choice among alternative arrangements for energy supply when it signed the agreement. This inquiry is urged by PSC to be distinct from the FERC determination whether the terms of the TEA are fair.

On February 22, 1985, before FERC responded to the PSC's request, the district court granted APC a preliminary injunction, effectively reinstating the September 28, 1984, PSC order. This court affirmed the district court's action on July 25, 1985. *Appalachian Power Co. v. Consumer Advocate Division of the West Virginia Public Service Commission*, 770 F.2d 159 (4th Cir. 1985).

While the preliminary injunction was in effect, but before entry of final judgment in the district court, FERC responded to the PSC's March 19, 1985, motion to clarify the jurisdictional issue, ruling that the issue of the TEA's prudence was not one that state commissions could consider. The PSC then requested that FERC rehear the issue, and, in an October 1, 1986, order, FERC reiterated its position that state authority to consider the TEA's "prudence" is preempted by the FPA.

On August 12, 1985, the PSC filed a motion with the district court to stay its proceedings, arguing that the jurisdictional issue still was pending before FERC and was more appropriately decided in the administrative setting. This motion was denied.

On November 22, 1985, while the preliminary injunction was in effect, the PSC issued a new order granting

APC's rate increase request, including the costs incurred under the TEA. As had the September 28, 1984, order, the newest order made recovery of the TEA's rates subject to refund if FERC found the TEA unjust or unreasonable. The November 22 order also released APC from the requirement of submitting the TEA for PSC approval.

On February 14, 1986, the district court granted APC's motions for summary judgment on the preemption and commerce clause claims. The court concluded that FERC's authority under the FPA to regulate the transmission and wholesale rates charged for transmission of energy in interstate commerce includes the power to determine the reasonableness of any contract affecting a rate or charge for the use of facilities involved in the transmission of energy from one state to another. Because the FPA provides a complete scheme for regulation of transmission of energy in commerce and ensures protection of a broader public interest than that protected by the states, there is no place for the type of state authority asserted by the PSC. The court found that if the PSC acted, as would be its prerogative under W. Va. Code § 24-2-12(f) (1986), to disapprove the FERC-approved TEA or to deny recovery of costs incurred under the TEA in APC's retail rates, the PSC would regulate interstate transmission indirectly, something it could not do directly. Appeals by the PSC and CAD, which we have consolidated, followed.

II

The primary issue in this case is whether the prudence inquiry the PSC seeks to make is preempted by the FPA's delegation of authority to FERC. More specifically, the issue is whether, in giving FERC authority

to regulate the transmission and wholesale sale of energy in interstate commerce, including the facilities and rates for such transmissions and sales, Congress left open to the states the power to consider the prudence of agreements regarding interstate energy exchanges.

We examine first the repositories of state and federal authority. FERC's jurisdiction to consider the merits of the TEA follows from its general power over "the transmission of electric energy in interstate commerce and the sale of such energy in interstate commerce." 16 U.S.C. § 824(a). To effectuate this general power, the FPA specifically delegates to FERC regulatory authority over the facilities used for the transmission and sale of interstate energy, 16 U.S.C. § 824(b)(1), and over "rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission," 16 U.S.C. § 824(a). FERC's role is to determine whether such rates and charges are just and reasonable and not unduly preferential, discriminatory, or disadvantageous to any party. 16 U.S.C. §§ 824d, 824e. FERC's jurisdiction over interstate wholesale rates is exclusive. *E.g., Nantahala Power & Light Co. v. Thornburg,* 54 U.S.L.W. 4676, 4677 (U.S. June 17, 1986).

Because the AEP network is a system for the transmission of interstate energy, FERC's jurisdiction to approve the TEA follows from its authority to regulate facilities used for such transmission. Alternatively, FERC jurisdiction over the TEA may be viewed as an exercise of its authority to scrutinize "rates or charges" for the transmission and sale of energy in commerce. Although the TEA does not explicitly set a dollar rate for the transmission and sale of electricity in commerce, it has the same

effect as if it did in that it creates the obligations owed by or payable to utility companies for the privilege of exchanging interstate electricity. As such, it is subject to FERC's exclusive jurisdiction over interstate rates.

The PSC's assertion of authority to consider the merits of the TEA is based upon W. Va. Code § 24-2-12(f), which requires PSC consent and approval before any public utility subject to the state's regulatory authority

> by any means, direct or indirect, enter[s] into any contract or arrangement for management, construction, engineering, supply or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.

In deciding whether to approve such contracts the PSC considers whether the contract's terms are reasonable, whether the contract gives any party an undue advantage, and whether the contract is in the public interest of the state. *Id.* at § 24-2-12. Any costs incurred under a contract that the PSC disapproves are not recoverable in the contracting utility's retail rates.

The PSC and CAD contend that the authority granted by W. Va. Code § 24-2-12(f) remains intact notwithstanding FERC jurisdiction under the FPA because of the language in the FPA's policy statement limiting "Federal regulation . . . to those matters which are not subject to regulation by the States."16 U.S.C.§824(a). The PSC argues that this statutory limitation upon federal jurisdiction forestalls the preemptive effect of the FPA in this case. According to the appellants, there is room for state consideration of what is labeled the "prudence" of the

TEA, because the inquiry into prudence is different from that undertaken by FERC.

We disagree, and conclude instead that the prudence inquiry the PSC wishes to make is not different from the FERC inquiry into the justness and reasonableness of the TEA. In support of their argument that the prudence inquiry the PSC would make under W. Va. Code §24-2-12(f) is distinguishable from - and thus not in potential competition with - the FERC consideration whether the TEA is just and reasonable, appellants rely upon *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735 (Pa. Commw. Ct. 1983). In *Pike County*, a Pennsylvania court ruled that a state commission retains power, in setting retail rates, to consider and reject the wisdom of a utility's contract to purchase interstate power at wholesale even though FERC, in setting the wholesale rate, already has found the terms of the interstate arrangement just and reasonable. The Pennsylvania court reasoned that the FERC inquiry focuses upon the wisdom of the sale from the perspective of the selling utility and its investors, leaving the state commission to consider the wisdom of the arrangement from the perspective of the buying utility and its investors and retail customers. Moreover, the issue before the state commission differs from that before FERC. The state commission considers whether the purchasing utility chose wisely among alternative sources of energy supply in entering into the particular agreement, not whether the terms of the agreement are just and reasonable.

While *Pike County* does recognize a realm of state authority to consider interstate agreements that FERC, in a slightly different context, also considers, we do not

believe the facts of the instant case permit invocation of that state authority even if the *Pike County* analysis be accepted. On a practical level, the *Pike County* inquiry is meaningless here because there is no alternative source of power for APC to choose other than that available through the AEP system, and the only access to that power is over the EHV lines whose costs are allocated by the TEA. Because the essence of the *Pike County* inquiry is whether a particular choice was wise, the lack of choice here makes such an inquiry an empty one. In the *Nantahala* case, 54 U.S.L.W. 4676, the Supreme Court recently recognized a similar futility in invoking the *Pike County* analysis. In *Nantahala*, the North Carolina Utilities Commission, in setting retail rates, claimed authority to apportion a particular source of "entitlement" power between two affiliated utilities after FERC already had made a fair allocation of that power in setting wholesale rates. The Court rejected as inapplicable the *Pike County* line of authority in part because there was only one available source for the particular "entitlement" energy at issue in *Nantahala*. *See id.*, at 4681-82.

Another reason the distinction *Pike County* drew between state and federal inquiries does not exist here is that, unlike the wholesale agreement at issue in *Pike County*, the TEA has no distinct "buyer" and "seller" of energy. *Pike County* had emphasized that FERC considers interstate agreements from the seller's perspective, while state commissions focus upon the in-state buyer. The nature of the TEA and the AEP system is such that an affiliated utility could be at one time a receiver or "buyer" and at another time a supplier or "seller" of energy. FERC thus necessarily considered the fairness of the agreement from the perspective of all involved parties.

The overlapping nature of what appellants would have us delineate as two separate questions becomes even clearer when we parse and compare, as did the district court, the particular questions FERC and the PSC would ask in deciding whether to approve the TEA. FERC considers (1) whether the agreement is just and reasonable, 16 U.S.C. § 824d(a); (2) whether the agreement is unduly preferential or disadvantageous to any party, *id.* at § 824d(b); and (3) whether the agreement is in the public interest, *see id.* at § 824(a). The PSC, under W. Va. Code § 24-2-12, would consider (1) whether the terms and conditions of the TEA are reasonable; (2) whether the TEA gives one party an undue advantage over the other, and (3) whether the agreement adversely affects the public interest. The identity of the inquiries each regulatory body would make demonstrates that in considering the TEA's "prudence," the PSC simply would duplicate FERC's inquiry into the justness and reasonableness of the TEA.

This duplication is impermissible primarily because the issue of the TEA's merits falls within FERC's exclusive jurisdiction to set interstate rates. As discussed previously, although the TEA does not set a rate per se, it is in essence a rate agreement in that it sets the obligations for the privilege of receiving energy over an interstate transmission network for resale to retail customers. It thus sufficiently resembles a filed rate to come within the realm of exclusive federal jurisdiction.

The Supreme Court's recent *Nantahala* decision supports our conclusion that states are powerless to exert authority that potentially conflicts with FERC determinations regarding rates or agreements affecting rates. The *Nantahala* Court reiterated the principle that in setting

retail rates states must give effect to FERC-approved wholesale rates and agreements affecting those rates. *Nantahala*, 54 U.S.L.W. at 4680; *see also Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977). Applying this principle, the Court denied the North Carolina Utilities Commission power to make the same inquiry into the fairness of the allocation of "entitlement" power that FERC already had made. Once FERC had allocated the entitlement power, the North Carolina Utilities Commission's reallocation of that same power for purposes of determining retail rates eroded the effect of the FERC determination and undermined FERC's exclusive jurisdiction. *See Nantahala*, 54 U.S.L.W. at 4681.

Allowing the states to make the kind of prudence inquiry urged in this case not only would pose the potential for direct conflict with FERC pronouncements but also would impede accomplishment of the purposes of the FPA. Preemption principles deny state authority to act in a way that would undermine the purposes of federal law. *E.g., Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The FPA's policy statement expresses the Act's purpose as protection of the public interest affected by the transmission and sale of electric energy in interstate commerce. *See* 16 U.S.C. § 824(a). The public interest thus protected is, of course, national in scope. The history of the FPA underlines the importance of the broad scope of the public interest the legislation seeks to protect. Congress enacted the FPA to fill a regulatory "gap" left by the case of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). *E.g., Pike County*, 465 A.2d at 737. In *Attleboro*, the Supreme Court had found state regulation of rates for the interstate wholesale sale of energy an impermissible burden on commerce. The Federal Power Act created

federal regulatory jurisdiction over such sales, reflecting the judgment embodied in the commerce clause that there are situations in which the broader perspective of federal authority is necessary.

Contrasted with this broad public interest protected by federal regulation is the narrower state public interest advanced by PSC regulation. *See, e.g.,* W. Va. Code § 24-2-12 (one function of the PSC is to prevent adverse effects on "the public in this state"). Because the prudence inquiry is inseparable from an inquiry into the TEA's justness and reasonableness, FERC and the PSC would be making identical, independent inquiries regarding the merits of the TEA but from the perspective of different public interests. It is possible that FERC and the PSC would reach conflicting conclusions regarding the impact of the agreement on their respective publics. Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro.* No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination. The likelihood of conflict in allowing each state to consider the TEA separately is highlighted by the conflicting contentions of the various states represented before the FERC proceedings regarding the TEA, Consumer groups and commissions from the various states associated with the AEP system claim that their states' citizens are unduly burdened relative to other states. Only FERC has the objectivity and comprehensive overview that transcends these local concerns.

Lodging exclusive authority in FERC to consider the

merits of the TEA thus forecloses the potential for differing state pronouncements regarding an agreement involving utilities regulated by various states. Conflicting conclusions of state commissions would discourage the type of interstate arrangement represented by the AEP system. Interstate sharing of energy resources ensures that customers receive service in spite of a deficiency in generating capacity within their state. Thus, it is in the public interest not to discourage the proliferation of these multistate networks. *Cf. Public Service Commission of West Virginia v. Federal Power Commission*, 437 F.2d 1234, 1239 (4th Cir. 1971) (discussing preemption under the Natural Gas Act, court noted that "[i]f the acquisition of rights in an interstate transportation line were subject to the veto of every state regulatory agency along the line, a single agency could seriously impair . . . the interests protected by the Act and prevent FPC from performing its statutory duties").

III

Because it is fundamentally at odds with the scheme Congress had established in the FPA to allow the states to change the arrangements filed with or established by FERC, we find the authority the PSC asserts here violative of the supremacy clause. State regulatory authorities must give effect in calculating retail rates to the costs and allocations reflected in the federally regulated transactions that precede final sale of energy.

AFFIRMED.

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No. 86-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S THIRD SUPPLEMENTAL BRIEF

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NEW ORLEANS PUBLIC SERVICE INC.,
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v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S THIRD SUPPLEMENTAL BRIEF

Pursuant to Rule 22.6 of the Rules of the United States Supreme Court, Respondents, the City of New Orleans, et al., submit this brief in response to Petitioner's Third Supplemental Brief, filed with this Court on March 14, 1987.

The recent decision cited by Petitioner, *Appalachian Power Co. v. Public Service Commission of West Virginia*, No. 86-2540 (4th Cir. Mar. 4, 1987), has only marginal relation to the case at bar and does not support review by this Court. It held that federal preemption barred a state "prudence" inquiry with respect to an interstate transmission agreement, where the very issues previously decided by the Federal Energy Regulatory Commission (FERC) were the same as those proposed to be considered by the state

agency. The court expressly relied upon the "identity of the inquiries" (Slip Op. at 13), the exclusive authority of the FERC with regard to interstate transmission arrangements (Slip Op. at 8) and the fact that the utility had no practical alternative to participation in the interstate transmission arrangement (Slip Op. at 12). The court thus found a direct, facial and indisputable conflict between federal and state action which made abstention inappropriate and required preemptive relief.

The contrast between the foregoing circumstances and those of the instant case is substantial. Thus, (1) The FERC's authority here, unlike its authority respecting interstate transmission rates, is confined to interstate wholesale power sale rates, with statutory reservation of retail ratemaking authority to the states, 16 U.S.C. § 824(a). (2) The retail ratemaking issues involved here, including such matters as rate "phase-ins" (also called "levelization") and rate design, were not decided by the FERC, but were left open for local administration. (3) There was no attempt here by the local authority to review the validity or "reasonableness" of an arrangement already approved by the FERC. (4) The instant case does not involve a "prudence inquiry". Rather a separate case involving the parties now pending before the 5th Circuit does so. *New Orleans Public Service, Inc. v. The Council of the City of New Orleans*, No. 87-3049 (5th Cir. filed Dec. 19, 1986). Even the prudence case does not involve consideration of matters previously addressed by the FERC—since both the FERC administrative law judge and, in subsequent testimony, the FERC Chairman, disclaimed determination of the

prudence issue.[1] Moreover, it does not involve circumstances where the utility had no practical alternative to the purchased power arrangement that was the subject of FERC adjudication.

Accordingly, the *Appalachian Power Company* case, relied upon by Petitioners, presents no conflict with the decision of the Fifth Circuit below and does not support review here. Rather, the differences between it and the case at bar, along with other decisions cited in Respondents' principal brief, suggest that review by this Court is unnecessary, inasmuch as the Courts of Appeals have given clear indication of their disposition toward correct application of established legal principles to particular cases.

CONCLUSION

For the foregoing reasons the petition should be denied.

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[1] See Respondents' principal brief in this matter (Brief for the City of New Orleans, Et Al., In Opposition to the Petition), p. 5, n.6.

Respectfully submitted,

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

This brief is filed pursuant to Rule 22.6 in response to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 86-49 ("the Government Brief"). The Government Brief[1] addresses review here and was served upon the parties to this action.

STATEMENT

The Government urges this Court to review a case that was prematurely and improvidently commenced, has been settled in substance, represents no conflict and is consistent with established law. After the FERC allocated Grand Gulf I costs to NOPSI as a wholesale rate, the Council confronted complex retail ratemaking issues—within its *exclusive* jurisdiction. The Government omits mention of any such issues. For example, in order to address the "severe rate shock effect" (Pet. at A-38.) portended by a 60 percent rate increase, the Council was entitled to consider rate "phase in" (or "levelization"), that graduates the increase over time to alleviate its impact.

The FERC's own administrative law judge declared that levelization had to be decided by local regulators: "The design of local retail rates to ultimate consumers is a matter within the jurisdiction of the states. . . . in light of the clear bright line which the Federal Power Act sought to draw between Federal and state jurisdiction over electric

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[1] References to the parties and other participants here are in the same form as in the respondent's principal brief. The Solicitor General and the FERC are, together, referred to as "the Government"; and their brief as ("G.Br."). References to respondents' principal brief are in the form ("CNO Br.").

utilities. *F.P.C. v. Southern California Edison, Co.*, 376 U.S. at 215-16." *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 at 65,148. NOPSI's lawsuit, which sought a mandatory, immediate and full pass-through, was entirely inappropriate.[2]

A. The Federal Power Act

The Government's presentation of the Federal Power Act omits any reference to the reservation of regulatory powers to the states. Section 201 of the Act, 16 U.S.C. § 824(a) concludes, "such Federal regulation, however, to extend only to those matters not subject to regulation by the States." The Act denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

In *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964), the Court concluded that Congress had "apportioned regulatory power between state and federal governments." *Id.* at 211 and adopted the *Attleboro* "bright line" that preserved the states' traditional role in setting local retail rates. *Id.* at 214-15.

The Government's refusal to acknowledge this limit is paralleled in its treatment of the "filed rate doctrine." Its impact on state retail regulatory powers was recently explicated in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986). *Nantahala* bears on abstention by

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[2] The local regulator must also consider how customer classes (industrial, commercial and residential) should bear the increase and can inquire into public interest issues that may suggest the desirability of cost absorption by a utility. It is not invariably in a utility's interest to pass on costs fully, which might initiate the "death spiral" effect of "rate shock." That is, business and low-income residents, leave or go bankrupt. Unpaid costs are then borne by a diminished customer base. This triggers a new round of failures, leaving the utility in a financially untenable position.

illustrating how a claim of preemption involving the filed rate doctrine may properly be dealt with. The decision was rendered on appeal from the North Carolina Supreme Court. Regulatory issues had been allowed to develop within the state system, for ultimate review by this Court.

There, the FERC had adopted a formula for allocation of costs between utilities located in different states. The state simply adopted a different formula as the basis for retail rates. The Court held that the "filed rate doctrine" barred adoption of a contradictory formula and required the state to pass through costs in order to avoid their "trapping." 106 S. Ct. at 2359. The Court held, however, that traditional retail ratemaking actions (*e.g.*, recognition of offsetting costs) could properly be taken. *Id.* at 2357-58.[3]

B. Proceedings Before the Counsel

The Government (pp. 10-15, 27) would portray NOPSI as having suffered unjustified administrative delay.Although the matter before the Council required factual and expert presentations, it could have been conducted more expeditiously, but for NOPSI's strategy. Even so, the time was a fraction of what the FERC took in the Grand Gulf I matter and other typical FERC and judicial, proceedings require. The Fifth Circuit found that there was no "bad faith, harassment or other exceptional circumstances," and indicated a different result if there had been. (Pet. at A-24.) The Government also omits to state that NOPSI sought a billion dollars in damages from members of the Council personally, apparently for intimidation. (Compl., par. 33.) Instead of participating responsibly, NOPSI bypassed opportunities for relief and sought to exhaust the Council's resources through litigation. (See Pet. at A-39.)

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[3] *See* note 2 *supra*. Moreover, although the prudence inquiry is not before the Court in this case, it should be noted that the *Nantahala* case did not involve managemental imprudence. See discussion *infra*.

NOPSI filed its application to increase retail rates just two days after the Council reacquired regulatory authority from the state commission. While the Council required time to institute orderly procedures, it acted responsibly throughout. For example, on July 17, 1985, after public hearing and technical review, the Council authorized NOPSI to issue $60,000,000 in securities. (R. Def. Ex. P.) The Council, on its own initiative, set a hearing on interim rate relief, Resolution R-85-423, and later provided relief.

During the proceedings NOPSI sought delays in setting of filing requirements, delayed submission of information, ignored invitations to seek interim relief, and testified, in the face of expert evidence, that it would become insolvent in September, 1985. It claimed inability to recapture the $32 million "advance payment" it had made (based on the improper allocation that the FERC had rejected), though, at the Council's instance, it did so. The Council enabled NOPSI to remain current on its Grand Gulf I payments throughout.

DISCUSSION

A. The case was correctly decided below.

The Government concedes the availability of abstention and that there is no *per se* rule against abstention in a federal preemption case (G.Br. 10, 22, n. 13); and that abstention depends upon "the particular preemption claim at issue." (*Id.*) It contends, however, that there can be no abstention if there is a "preemption claim based on the filed rate doctrine" (*id.*), arguing for special treatment of FERC decisions.

Both courts below found a compelling need for *Burford* abstention here. The Fifth Circuit stated that, "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able

to address NOPSI's complaints about Council actions. . . ." (Pet. at A-19.)[4] Yet the Government contends that there were "no state law or policy concerns" present here. (G.Br. at 17.) Moreover, it denigrates abstention where the proceeding is before a state administrative body (G.Br. 14-20, especially n. 11). The law is to the contrary. *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 349 (1951), *See also Robert-Gay Energy Enterprises Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77 (4th Cir. 1985); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). The Council's authority is on equal plane with LPSC; in fact, NOPSI derives its authority to operate from the Council.[5]

The three part test of *Younger* was also met here.[6,7] This Court's recent decision in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), is virtually dispositive. The Court of Appeals held that a state administrative proceeding—which involved selection criteria for teachers, "intrusive" actions and con-

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[4] The Fifth Circuit could also have held that the court should not become involved in the unnecessary determination of constitutional questions—here under the Supremacy Clause, on premature challenge, based on an undeveloped regulatory record—under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[5] *See* Louisiana Annotated Statutes § 33-4405; New Orleans Ords. Nos. 6822 and 7068.

[6] Section 4-1604 of the 1954 Home Rule Charter, provides for prompt judicial review of the Council's actions. The Court is empowered to grant plenary relief. *See* La. Const., Art. 4, § 21(E). Louisiana courts have vigorously enforced the filed rate doctrine. (CNO Br. p. 17 n. 22.)

[7] *See Middlesex County, Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 432-43 (1902); *United Services Automobile Association v. Muir*, No. 85-5662 (3d Cir. Jun. 6, 1986) *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981).

tinuing surveillance[8]—violated the complainant school's Constitutional rights. 766 F.2d 932, 942-43, 961-62 (6th Cir. 1985). This Court reversed, noting that the school's claims could be raised at state level. It restated that it is, "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 106 S. Ct. at 2723. (Emphasis by the Court.)

The Government contends that *Younger* is inapplicable here, claiming erroneously that NOPSI participated in a "multistate 'common pool' " and that a decision one state has "a corresponding direct adverse effect on the citizens of other participating states," (G.Br. at 18). The Council never acted, and it would have been inappropriate to speculate that its decision would burden other states. The Council also disclaimed any action that would have NOPSI bear any costs other than those assigned by the FERC (Resolution No. R-85-636). Moreover, each of NOPSI's three sister operating companies, also allocated Grand Gulf costs, entered into rate agreements that involved "phase-in" plans and cost absorption.[9] These did *not* have a "corresponding direct adverse effect" on NOPSI, and its president so testified.[10]

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[8] The state had sought extensive discovery and used its "coercive tools" to compel practices inconsistent with complainant's tenets. 766 F.2d at 950-51.

[9] *Arkansas Power and Light Company*, Docket No. 84-249-U, Order No. 26 (Arkansas Public Service Commission, Sept. 9, 1985); *Mississippi Power and Light Company*, Docket No. U-4620, Final Order on Rehearing (Mississippi Public Service Commission, Sept. 16, 1985); *Louisiana Power and Light Company*, Order No. U-16945 (Louisiana Public Service Commission, Nov. 14, 1985).

[10] Deposition of James M. Cain, December 23, 1985, *In the Matter of Ex Parte Application of New Orleans for An Increase of Its Electric Rates* (Docket No. CD 85-1), pp. 125-131.

B. There is no conflict among the circuits.

As to the Government's claim that abstention is never warranted "in the context of a preemption claim based on the filed rate doctrine," there is clearly no conflict since *not one* court has suggested such a rule. Because *all five* of the cases proffered by the Government are distinguishable, there is no conflict at all.

(1) In *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3d Cir. 1986), the court declined to abstain where a particularized state response had been fully articulated—by *all three* branches of the government. 791 F.2d at 1113, 1114, 1118.

(2) In *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), the state proposed to void *ab initio* the agreements with respect to Grand Gulf, 772 F.2d at 408, so that the utility might avoid *any* costs assigned by the FERC, *id.* at 411. There was *complete* preemption.

(3) In *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), the court abstained where the state commission had taken substantive action; the state courts were in an "advanced stage" of considering the matter, 713 F.2d at 1029; and fact-finding would be required as to the effect of the utility commission's order. *Id.* at 1030.

(4) In *Appalachian Power Co. v. Public Service Commission of West Virginia*, No. 86-2540 (4th Cir. Mar. 4, 1987), previously briefed,[11] the same court demonstrated willingness to reach a preemption claim, and it barred a state prudence inquiry where the particularized issues were *identical* to those already determined by the FERC. (Slip Op. at 13).

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[11] Respondents' Brief In Opposition To Petitioner's Third Supplemental Brief, Filed March 30, 1987.

(5) In *American Electric Power Company, Inc. v. Kentucky Public Service Commission*, the Sixth Circuit affirmed abstention under *Younger*, (although it held *Burford* inapplicable because the state commission had *already acted*) because of parallel proceedings in the state court.

C. Other Factors Bearing on Review.

The abstention issue is important only if the Court were to upset the particularized consideration that now characterizes court decisions. If local regulators were stripped of their powers to moderate increases, there would be irreparable economic damage, the Congressional judgment in favor of localized adjustment would be undermined, and utilities would be encouraged to exhaust local resources by litigation that sought federal intrusion into a traditionally state process—a course followed by NOPSI here.

The Government erroneously asserts that utilities will be subjected to "irreparable damages".(G.Br. at 23). Local regulators can grant *interim* relief and provide for recovery of costs borne during the proceeding. (Resolution No. R-85-526.) Financial planning by utilities is customarily based on an interlude for regulatory consideration. The claim that it is not lawful in most jurisdictions to allow for costs incurred during the regulatory interim is specious.[12] In fact the rate agreement here included recovery

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[12] The Government concedes that Resolution No. R-85-526 allowed NOPSI to recover costs incurred during regulatory consideration, but suggests that the Council "appears not to have the authority to make that guarantee." It cites only *Louisiana Power & Light Co. v. Louisiana Public Service Comm'n.*, 377 So.2d 1023, 1027-1029 (La. 1979). That case addressed the different problem posed when a utility "surcharged" retroactively a class of ratepayers to recover a refund made to a different class, and it does not address regulatory inclusion of deferred costs in rates. NOPSI earlier raised this argument in *Middle South Energy, Inc. v. The City Council of New Orleans*, Civ. Action No. 85-5273 (E.D. La., Dec. 11, 1985) ("*NOPSI II*") but was met by undisputed testimony that the Council's action conformed with others nationwide, all under state laws barring "retroactive ratemaking."

of such costs. Instead, the Government would subject communities to irreparable damage because it is impossible to reconstitute closed businesses or repatriate residents forced to relocate as a result of rate shock. However, no court has adopted the Government's position.

The states' obligation to reflect costs allocated by the FERC has just been explicated in *Nantahala*, relied upon by the court below. Since *Nantahala* applies to wholesale costs of "joint financing and power production arrangements," which the Government posits as a basis for review here (G.Br. 22), there is no need to review the issue.

Finally, any decision here would be rendered in the context of a FERC allocation which may itself be ephemeral. The appeal of its decision will be reheard *en banc* "limited to the issues raised by the dissenting opinion." *Mississippi Industries v. FERC*, No. 85-1611, (D.C. Cir. Apr. 3, 1987). That dissent found untenable the FERC's allocation of nuclear plant costs that failed to remedy the disparities which it held discriminatory. *Id.*, Slip Op. at 1-3 (D.C. Cir. Jan. 6, 1987) (Bork, J., dissenting).

D. Comparison with the AEP case

The Government concedes that the issue here is "blemished by procedural problems" (G.Br. 23), but argues for review here, but not in *AEP*. In *AEP*, the state commission had already acted. Here, the complaint was filed before the Council had a chance to act, and while NOPSI bypassed opportunities for interim relief.[13] In *AEP*, the controversy is active; here, it has been settled.

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[13] The Government contends that *Younger* abstention is inappropriate because the Council's ratemaking proceedings are "essentially a legislative function." (G.Br. 19 n.11) They are no more "legislative" than the FERC's own. The hearings are governed by rules of procedure, provide for cross examination, are fully transcribed, result in written decisions, and are subject to state court review (*see* n.6 *supra*). The Government's suggestion that the Council's deliberations should be ov-

E. The Prudence Proceedings.

The Government misstates that NOPSI's complaint "necessarily includes" a challenge to the prudence inquiry. It did not, and the Fifth Circuit conducted no review of it. The inquiry was initiated after the complaint here was filed (Res. R-85-636, Oct. 17, 1985). Moreover, NOPSI commenced an entirely separate action, challenging that inquiry, *"NOPSI II,"* now pending before the Fifth Circuit.

The Government also misstates that the prudence inquiry was causally related to the Council's alleged refusal (which did not occur) to reflect NOPSI's costs in retail rates. In fact, the rate agreement was implemented *notwithstanding* the inquiry. The complaint in *NOPSI II*, conceded that "Defendants failure to grant adequate rate relief is not at issue in the present case." (Compl. Par. 10.)

The Government asserts that the Council has no authority to conduct a prudence inquiry even though FERC has conducted no such inquiry. (*See* CNO Br. at p. 5, n.6.) Resolution, R-85-636 declares that, "the Council will not seek to . . . order NOPSI to pay MSE a rate other than that approved by the FERC." The prudence hearings, now complete, have focused on whether NOPSI's management acted imprudently in respects which would *not* disturb its interstate commitments. It is improper to presume that the Council will act in a manner violating its Constitutional responsibilities. More important, this issue is not before the Court in this case.

CONCLUSION

For these reasons the petition should be denied.

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erridden because it is popularly elected denigrates those who have responsibility to an electorate and would disqualify a substantial number of state trial and appellate courts. The suggestion that the Council might act improperly here because it also is considering a proposal to municipalize NOPSI, merits no reply. The same argument would undermine the integrity of the New York State Public Utility Commission with respect to the Long Island Lighting Company, since the Commission is appointed by the Governor, who is championing state takeover of that utility. Wall St. Journal, Jan. 15, 1987, at 10, col. 1.

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No. 86-546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* and BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the Edison Electric Institute ("EEI") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

SPECIAL INTEREST OF THE EDISON ELECTRIC INSTITUTE

EEI's members are investor-owned electric utilities that generate, transmit and sell electricity at wholesale and at retail throughout the nation. These services are made

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[1] EEI has obtained consent to file this brief from the petitioner. The letter granting consent has been filed with the Clerk of the Court. The respondents have not consented to EEI's participation.

available to customers via power supply and distribution arrangements that cross state lines, creating a nationwide power system that requires uniform and predictable regulation.

At issue in this case are matters of urgent concern to virtually every member system of EEI, almost all of whom participate in one or more forms of interstate transactions, incurring costs pursuant to federally-approved rates. When those costs are scrutinized by state utility commissions with results at variance with federal regulation, costs are then "trapped" between federal and state or local regulation. A utility so stricken does not suffer in isolation. Its own ratepayers will, in the long run, suffer, as will its employees, its investors, its affiliates and subsidiaries, and its generation and transmission project co-owners.

All utilities have a stake in the availability of the federal district courts for the arbitration of federal preemption issues. Every electric utility company faces the potential conflict between federal and state regulation of contracts and rates that is an inevitable result of our system of dual regulation and interstate power arrangements. Because so many utilities are now involved in interstate transactions, the industry can be adversely affected by a single local regulatory body whose actions in one state can unjustifiably threaten billions of dollars invested in other states.

This clash between two regulators will arise in many factual situations, some similar to and others differing from the one that the petitioner is now presenting to the Court. As utilities become more deeply involved in interstate arrangements, the same question of the scope of the Federal Energy Regulatory Commission's plenary jurisdiction over such transactions will arise—as will the question of whether and if so, when, a federal district court should abstain from deciding that question on the

merits. EEI's members have a vital interest in this Court's evaluation of the interplay between federal and state interests in public utility regulation that goes beyond the specific factual issue presented by the petitioner.

EEI believes that it can provide insight as to the national scope of the concerns at issue in this case. The attached brief as *amicus curiae* demonstrates the significance of these issues to all of EEI's members.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EEI respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE

The members of Edison Electric Institute ("EEI") are investor-owned electric utility companies supplying electric service to individuals, industries and businesses throughout the United States. EEI's members serve approximately 96 percent of all customers of investor-owned utilities and 73 percent of this country's power consumers.

This nation's growing electric needs are increasingly met by arrangements that involve utility companies operating in more than one state: power pools; coordina-

tion, exchange and interconnection arrangements; and transactions like that at issue here: affiliated utilities in different states that share in the costs and output of a generation facility. Not only does this arrangement meet generation needs where an individual company lacks sufficient resources to finance a plant on its own, but it also permits risk-spreading and economies of scale, thus meeting the nation's electric needs by the most economic means possible.

Because these arrangements usually involve several states, uniform regulation of interstate transmission and wholesale transactions is required. The passage of the Federal Power Act ("FPA"), with its grant of exclusive jurisdiction to the Federal Energy Regulatory Commission ("FERC") over these areas, is the clearest evidence possible of this strong federal interest in uniform regulation. It can be expected that each state will promote the lowest retail electric rates possible for its own residents and businesses. The conflict between state and federal regulation that inevitably emerges from these attempts disrupts utilities' efforts to provide least-cost and reliable energy to power consumers in more than one state. This conflict poses a clear threat to the continued development of national energy resources.

The repercussions of this conflict are vividly illustrated by the phenomenon of "trapped costs." As the petitioner, New Orleans Public Service Inc. ("Public Service") points out, in August of 1985, it began to incur approximately $15 million in "trapped costs" each month, a sum which exceeds a typical year's earnings for Public Service. Pet. at 4 n.4. This $15 million represents costs that the FERC directed Public Service to bear at the wholesale level as its share of the cost of Grand Gulf Unit No. 1.[1] When a state ratemaking body fails to

[1] An affiliate of Public Service, System Energy Resources, Inc., owns 90 percent of Grand Gulf 1. *See* Pet at 3 n.3. At issue before the FERC were the allocations of that 90 percent share among the

provide the utility recognition of these costs in retail rates, the state body achieves its parochial goal—lower retail rates for its own ratepayers—but FERC's actions and goals are undermined. Only a federal arbiter possesses the requisite jurisdiction and national perspective to assure uniform and fair oversight of these conflicts.

Federal court abstention intensifies and prolongs the crises precipitated by "trapped costs" in denying the strapped utility a prompt and fair resolution of the dispute in the appropriate federal forum. The delay that abstention creates can prove disastrous for a utility, both financially and operationally, while encouraging the state's recalcitrance. Even though this Court has provided a clear resolution of the underlying issue of preemption in *Nantahala*,[2] the crisis precipitated in this field will continue unabated until the corollary abstention question is resolved. This Term, the *AEP* case presented the Court with the same core question of abstention in the face of a preemption claim under the FPA. *American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n*, No. 85-5121, slip op. (6th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 17, 1986) (No. 86-49) *order requesting Solicitor General's views*, 55 U.S.L.W. 3231 (U.S. October 6, 1986) ("*AEP*").[3]

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four operating subsidiaries of the Middle South system, including Public Service. As the petitioner points out, at a later time Public Service and the Council reached a conditional partial settlement. That settlement provided for partial retail rate recovery of some of the FERC-allocated costs. Under that settlement, however, the Council reserved its "right" to reduce the level of FERC-mandated costs recognized in Public Service's retail rates in a prudence inquiry. *See* Pet. at n.7.

[2] *Nantahala Power & Light Co. v. Thornburg*, —— U.S. ——, 106 S. Ct. 2349 (1986) ("*Nantahala*").

[3] EEI has also participated in both the *Nantahala* and *AEP* proceedings as an *amicus curiae*.

STATEMENT OF THE CASE

EEI adopts the petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS YET ANOTHER IN AN ALARMING TREND OF CASES WHERE THE LOWER FEDERAL COURTS ARE ABDICATING THEIR PROPER ROLES.

EEI's prediction to this Court in its *amicus* brief in *AEP* (at 4-5) is already coming true—controversies involving the same array of *Nantahala* issues are again and again being deflected to this Court for resolution, when they are more properly addressed at the federal district court level. Together with *Nantahala* and *AEP*, this is now the third time in two years that a "trapped costs" case has come up to this Court following a federal district court's decision to abstain. This Court should instruct the lower tribunals that they can, and should, adjudicate *Nantahala* cases that are properly before them.

The Fifth Circuit's suggestion that abstention does not "foreclose" review of Public Service's preemption claim by the Supreme Court (Pet. App. at A-20) reveals a profound misunderstanding of the Supreme Court's role in addressing this federal question. Having resolved the underlying legal question in *Nantahala*, this Court should not be called upon to apply it to each new set of facts arising under that question, as the Fifth Circuit's logic would entail. This is precisely the role that the district courts are designed to play. The fact that *AEP*, *Nantahala*, and now the case below, all came so recently before this Court illustrates how abstention by a federal district court has kept clear-cut cases of federal preemption from being decided in a consistent and prompt manner, and in the most efficient forum.

II. THE CONFUSION BOTH AMONG AND WITHIN CIRCUITS IN THIS AREA OF LAW IS INCREASING AND REQUIRES RESOLUTION.

The Fifth Circuit's curious reversal of its prior determination in the same case is exemplary of the confusion that exists on this matter. The split among the circuits at the time of AEP's petition for certiorari in July of this year has intensified. At that time, the Sixth and Fourth Circuits[4] had condoned abstention in the face of a preemption claim under the FPA or its analogue, the Natural Gas Act, while the Third, Fifth, and Eighth Circuits had not.[5] The Fourth Circuit subsequently affirmed a district court's injunction of a state ratemaking order in *Appalachian Power*.[6] The Sixth Circuit displayed profound internal confusion as to the particular strand of abstention doctrine that it considered applicable in its *AEP* decision. No single judge in the three-judge panel in that case was able to agree with the others as to the appropriate analysis.

Even more notable here is the fact that the split among the circuits has resulted in contrary results for two members of the same holding company system. *Compare* the

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[4] *AEP; Aluminum Co. of America v. Utilities Comm'n of N.C.*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

[5] *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986); *New Orleans Public Service Inc. v. New Orleans*, 782 F.2d 1236, *modified*, 798 F.2d 858 (5th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3295 (U.S. October 3, 1986) (No. 86-546); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 884 (1986).

[6] *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W.Va.), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D. W.Va. 1986).

case below (Pet. App. at A-14 - A-24) with *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 593 F. Supp. 363 (E.D. Ark. 1984), *aff'd*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 884 (1986). That such conflicting results should occur for affiliated utilities on questions arising out of the same transaction, merely because of geographical happenstance, signals that abstention here is thwarting the doctrine's intent by creating confusion, and not avoiding it. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) ("*Burford*").

III. CERTIORARI IS NECESSARY TO CORRECT THE FIFTH CIRCUIT'S MISAPPLICATION OF *NANTAHALA*.

The Fifth Circuit's decision to abstain from adjudicating a FPA preemption claim creates a dangerous and anomalous precedent: under the Fifth Circuit's reasoning, when a federal statute expressly reserves to the states an area in which they have the power to regulate but otherwise preempts state action, a federal district court is foreclosed from ever determining the precise scope of jurisdiction that Congress intended to leave to the states. This precedent is even more dangerous for the way in which this Court's *Nantahala* decision is misused to rationalize the result.

A. The Case Below Fell Clearly Within the Ambit of *Nantahala*.

The merits of the federal question presented in the case below are unquestionably controlled by *Nantahala*. In that case, this Court clearly articulated the boundary where state retail ratemaking leaves off, and federal oversight begins:

> FERC clearly has exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers. See 16 U.S.C. § 824(b); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340

> . . . (1982). Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must rather give effect to Congress's desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

106 S. Ct. at 2357.

If anything, the preemption issue in the case below is even more readily apparent than in *Nantahala*, where the manner in which FERC had set the "rate" and cost allocation was more complicated. *Nantahala*, 106 S. Ct. at 2352-53. Here, it is crystal clear: in Opinion No. 234, FERC unambiguously modified the cost, capacity and energy allocations in the filed unit power sales agreement for Grand Gulf Unit No. 1 and directly ordered Public Service to pay 17 percent of the costs for Grand Gulf Unit No. 1.[7] Once FERC set that cost allocation, Public Service had no choice but to pay it, or risk violating FERC's order.

Given the large sums involved, Public Service could not afford to absorb those costs, even for a brief period, and it promptly filed with the Council for recognition of those costs in its retail rates. As a matter of federal law, the Council was required to recognize the costs as legitimate operating expenses in Public Service's rates; the failure to do so would render them "trapped costs." The Council, however, refused to grant Public Service rate relief reflecting the FERC-approved operating expense,[8] in direct contravention of the FPA.[9]

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[7] The Council had actively participated in the FERC proceeding. There it unsuccessfully argued that Public Service should be allocated a lower level of costs. *See* Pet. at 3.

[8] As noted above, the Council and Public Service have reached a conditional partial settlement relative to this dispute, but the full, timely recognition of the FERC-mandated expenses has not been forthcoming from the Council. *See* note 1, *supra*.

[9] *See Nantahala*, 106 S. Ct. at 2357, quoted *supra* at pp. 6-7.

B. The Fifth Circuit Misconstrued and Confused the Interplay Between Preemption Doctrine and Abstention Doctrine.

The Fifth Circuit did not ignore the *Nantahala* decision, but certainly gave it an unusual twist. Conceding that abstention in the face of a preemption claim is "problematical," Pet. App. at A-15, the Fifth Circuit nevertheless relied on *Nantahala* for the proposition that "local control over retail rate making is not preempted by federal law." Pet. App. at A-16. The court then reasoned: "The structure of the Federal Power Act, preserving as it does state jurisdiction over retail rates, suggests that these local institutions should normally proceed unfettered by federal interference." Pet. App. at A-17.

As a rationale for abstention, this reasoning begs the question: while it is true, as *Nantahala* noted, that states retain local control over retail rates, the very question at issue here is whether that is what the Council is properly controlling. Where local institutions like the Council wield their control over retail ratemaking in a fashion that interferes with FERC's exclusive jurisdiction over interstate wholesale rates, they are engaging in wholesale, not retail, ratemaking and in the regulation of interstate commerce. In these cases, it is the *federal* domain that is improperly subjected to state interference. The "bright line" between federal and state rate regulation that this Court affirmed and strengthened by its decision in *Nantahala* [10] thus counsels against abstention, not for it. The precedent set in the opinion below would turn both *Nantahala* and the FPA on their heads.

Indeed, the Fifth Circuit has departed from its own prior position on this point. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744

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[10] 106 S. Ct. at 2356-57, *quoting FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964).

F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds*, —— U.S. ——, 106 S. Ct. 2884 (1986) (*"South Central"*), the Fifth Circuit affirmed a decision not to abstain where "the claim presented . . . is predicated upon a naked exercise of the federal preemption power." In its first decision below, the Fifth Circuit cited this precedent with approval. Pet. App. at A-13.

Other circuits have honored this same reasoning. In *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206, 212 n.1 (9th Cir. 1980) (*"IBEW"*), the Ninth Circuit explained:

> A preemption claim alleges in essence that Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions. If a preemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate.[11]

In reversing its first decision below, the Fifth Circuit failed to address its own conflicting precedent in *South Central*, but denounced the reasoning of the *IBEW* case as "unnecessary dictum." The court feebly attempted to distinguish *IBEW* on the grounds that the case did not involve the FPA, a statute that expressly reserves to the states some local authority. Pet. App. at A-20 - A-21. The FPA is not unique, however, in reserving an area of regulation to the states.[12] For example, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-12 (1982 & Supp. III 1985) ("HMTA"), regulates interstate transportation of hazardous materials. As with the FPA, the HMTA allows certain authority to remain with the states. Section 1811, 49 U.S.C. § 1811 (1982).

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[11] *Accord, Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 373, 377 (9th Cir. 1982); *Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983).

[12] Even in the absence of express statutory reservation, the Constitution reserves some authority to the states. U.S. Const. amend. X.

This fact, however, has not prevented a federal district court from adjudicating a preemption challenge to state regulation of hazardous materials transportation. *See, e.g., National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983). *See also, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 489 F. Supp. 699 (E.D. Cal. 1980), *rev'd on other grounds*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983); *Pacific Legal Found. v. State Energy Resources Conservation and Dev. Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979), *rev'd on other grounds*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983) (decided under Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1982 & Supp. III 1985)). Conspicuous by its absence from these cases is any discussion of the possible applicability of abstention doctrine.

To abstain under either *Burford* or *Younger*[13] is to decide that the state interests at issue outweigh whatever federal interests exist. In essence, then, the Fifth Circuit's decision to abstain prejudged the preemption question, and in so doing, eviscerated the *Nantahala* doctrine before it was even heard on the merits. *See, e.g., IBEW*, 614 F.2d at 212 n.1 ("[A] court cannot abstain under *Burford* in a preemption case without implicitly ruling on the merits of the action."). Certiorari is necessary to correct this misuse of a principle so recently established by this Court.

IV. THE FIFTH CIRCUIT EMPLOYED BOTH *YOUNGER* AND *BURFORD* ABSTENTION IN A MANNER AT ODDS WITH THIS COURT'S ENUNCIATION OF THOSE DOCTRINES.

Both the *Younger* and *Burford* strands of abstention are driven by a desire to avoid needless federal interference with legitimate state-created interests and proceedings. This core policy must be reconciled, however,

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[13] *Younger v. Harris*, 401 U.S. 37 (1971).

with the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citations omitted) ("*Colorado River*"). Abstention doctrine should not apply to remove from federal district courts cases properly before them that deserve, by virtue of their overwhelmingly federal nature, federal district court adjudication. Abstention is only appropriate where the matter can with certainty be satisfactorily and fully resolved in the state forum, and only in those "exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959), *cited in Colorado River*, 424 U.S. at 813. Because the case below presents an archetypical federal question—preemption—no such countervailing interest exists, and there is no assurance of adequate redress within the state system.

A. *Burford* Abstention Is Inappropriate Where the State Has Invaded the Federal Regulatory Domain.

The Fifth Circuit relied on *Burford* and *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951) ("*Alabama*") to justify abstention in the face of a preemption claim under the FPA. The strand of abstention doctrine in *Burford* and its progeny, however, is misplaced where there exist both a federal and state scheme of regulation of the same subject matter, and a sharp division between the two.

Burford abstention is designed to protect a state's legitimate interests in creating and administering a coherent state-wide regulatory scheme. *Burford*, 319 U.S. at 332-34. Its applicability presupposes local facts, state law or policy questions, and an expert state body skilled at construing the state-specific facts at issue. *Id.* More fundamentally, it presupposes a situation in which the

state is the exclusive regulator. These underlying prerequisites for *Burford* abstention are lacking here.

In *Burford*, the federal attack on the validity of a state order granting permission to drill oil wells was based on diversity of citizenship and a due process claim. *Burford*, 319 U.S. at 317. No federal statutory scheme governed the issue before the court, and no preemption claim existed. *Id.* at 319. Similarly, in *Alabama*, a railroad company challenged an order of the state railroad commission based on diversity and a confiscation claim. *Alabama*, 341 U.S. at 342-43. The Court specifically stated that the Interstate Commerce Commission lacked jurisdiction over the subject matter at hand. *Id.* at 346 n.7.

Under those circumstances, abstention to prevent federal interference with the state's exclusive regulatory scheme may have been appropriate. But where Congress has created a federal regulatory scheme, with a carefully-drawn "bright line" between state and federal interests, abstention undermines Congress' preemptive intent. The Fifth Circuit's abstention decision effectively frustrates the application of the superior interests of the FERC enunciated by this Court in *Nantahala*.[14]

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[14] Ironically, the Fifth Circuit also relied on language in *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) ("*Lewis*") for the proposition that abstention is proper when the federal interest "touches some overriding state interest." Pet. App. at A-19. Whatever value these words may carry as *dictum* is doubtful, inasmuch as the holding in *Lewis* was against abstention. The court rejected *Burford* abstention because the appellants had attacked but one section of a large and fairly complex state regulatory scheme. Invalidation of that one aspect would scarcely disrupt the state's system of regulation. *Lewis*, 559 F.2d at 955. As in *Lewis*, requiring the Council in a single rate proceeding to recognize FERC-approved costs for one portion of one utility's cost of service is hardly an attack on the Council's authority to set just and reasonable retail rates.

B. *Younger* Doctrine Is Not Intended to Assist States in Thwarting Federal Regulation of Wholesale Ratemaking.

Younger abstention doctrine emerged from the context of a federal action to enjoin a state's prosecution of state criminal violations. *Younger*, 401 U.S. at 40. It is premised on "a proper respect for state functions." *Id.* at 44.

Subsequent decisions have extended *Younger* somewhat to civil proceedings where important state interests are involved and to administrative proceedings "judicial in nature" in which important state interests are vindicated, so long as the federal plaintiff is afforded a full and fair opportunity in the state proceeding to litigate his constitutional claim. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-34 (1982); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, —— U.S. ——, 106 S. Ct. 2718, 2723 (1986) (*"Ohio Commission"*).

There are no state interests at issue in the case below, however, sufficient to bring it within *Younger*'s scope. The only question is whether the Council must recognize a FERC-approved cost allocation in setting retail rates. That question is answered by federal law.

The Fifth Circuit nevertheless reasoned:

> The interest of the Council of New Orleans in setting retail rates is clearly important here: indeed, jurisdiction over retail rates is preserved to the states by the terms of the Federal Power Act.

Pet. App. at A-23 - A-24. That the FPA reserves to the states the power to set retail rates is irrelevant. Retail ratemaking is not the type of state interest protected by *Younger*, as even a cursory reading of this Court's

seminal *Younger* doctrine cases reveals.[15] *See Ohio Commission*, 106 S. Ct. at 2723 and cases cited therein, all of which involve the state's interest in exercising its enforcement powers to protect its citizens' health, safety and morals.[16]

Even if retail ratemaking were considered to be within the *Younger* category of interests, the critical fact here is that the state has forayed beyond the "retail" boundary, and engaged in regulation of wholesale rates in interstate commerce. No state has a legitimate, much less an important, local interest in the purposeful disobedience of federal law and policy.

Moreover, the delay that abstention entails negates any "full and fair opportunity" to litigate a preemption claim in the state courts. *See id.* at 2723. The result of abstention here is the "opportunity" for Public Service to lose, permanently, up to $15 million every month, while a clear federal question involving neither state law nor state policy is ignored by a recalcitrant local body dissatisfied by FERC's rulings.[17]

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[15] Even if retail ratemaking were, *arguendo*, protected under *Younger*, the simple recognition of the FERC-allocated costs would not interfere with ratemaking functions not controlled by federal law.

[16] As the petitioner points out, ratemaking is not the "judicial" category of proceeding that one encounters in the *Younger* line of enforcement cases. Pet. at 14 & n.16. This Court's most recent case applying *Younger* doctrine expressly noted that where a proceeding is not "judicial in nature", abstention may not be appropriate. *Ohio Commission*, 106 S. Ct. at 2723 n.2, *citing Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-39 (1984).

[17] The U.S. Court of Appeals for the D.C. Circuit recently explained:

> [T]he need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts, however, is . . . problematical. This extension

There are, in addition, exceptions to *Younger* that the Fifth Circuit should have recognized and applied. For example, *Younger* abstention is not appropriate when the action in question poses a threat of "irreparable injury." The Fifth Circuit's suggestion that review might be had eventually in the Supreme Court ignores the great financial distress that Public Service suffers while its preemption claim slowly "wind[s] its way up through the state courts." Pet. App. at A-20. The Fifth Circuit's cavalier belief that these long, expensive delays are acceptable is shockingly insensitive to the realities facing Public Service and the utility industry in general.

The Court in *Younger* also pointed out that abstention is inappropriate where a state statute is patently invalid on its face. *See Younger*, 401 U.S. at 53-54. The state action complained of by the petitioner here patently violates the Supremacy Clause. Given this Court's holding in *Nantahala*, the clear-cut nature of FERC's order, and the flat refusal of the Council to honor it, the Council's action is not protected against federal intervention by *Younger*. The Fifth Circuit halted its analysis, however, before it even reached this question.

V. THE FIFTH CIRCUIT'S DECISION TO ABSTAIN CONFLICTS WITH ITS EARLIER, CORRECT DECISION UNDER THE JOHNSON ACT.

In its earlier decision, the Fifth Circuit properly held that the Johnson Act, 28 U.S.C. § 1342 (1982), did not bar federal district court review, because Public Service presented a preemption claim. Pet. App. at A-12. This was a proper ruling and consistent with the court's prior decision that abstention was not appropriate.

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would make federal courts cinderellas to their sister state courts in adjudicating federal constitutional rights, their native area of competence and jurisdiction.

Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 702 (D.C. Cir. 1984).

The Johnson Act cannot be understood as anything but a codification of judge-made abstention doctrine in utility rate cases. Its legislative history indicates that it was designed to prevent undue federal court interference with those aspects of state ratemaking that are purely local. *See* 80 Cong. Rec. 1916, 1916-18 (Feb. 5, 1934). Because federal district courts had been engaging in *de novo* rate hearings on appeal of state rate orders, they frequently substituted their own judgments for those of the local administrative bodies that already had held hearings on these local issues. *Id.* at 1916. The Johnson Act was designed to restrict this sort of direct federal interference in local ratemaking. The Act specifically exempts, however, federal cases presenting preemption claims. The implication of this specification is that, because of the overwhelmingly federal nature of a preemption claim, the case is in fact best suited for adjudication in a federal district court.

Hence, there is an evident lack of logic in the Fifth Circuit's belief that abstention is particularly appropriate when the claim is preemption under the FPA. Its assertion cannot be reconciled with the Johnson Act's purpose and operation. The conflicting nature of these rulings indicates how far amiss the Fifth Circuit's abstention decision has gone.

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

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No. 86-546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

System Energy Resources, Inc. ("SERI") formerly Middle South Energy, Inc., respectfully moves this Court for leave to file the accompanying brief in this case as *Amicus Curiae*. Pursuant to Rule 36.1 of the Revised Rules of the Supreme Court, SERI requested consent of all parties for the filing of this brief. Although Petitioner consented, Respondents have refused to do so.

SERI, the principal owner of Grand Gulf Nuclear Electric Station Unit No. 1 ("Grand Gulf 1") and the wholesaler of power therefrom, has a direct interest in Opinion No. 234 of the Federal Energy Regulatory Commission ("FERC"), the effect of which is at issue in the case *sub judice*. The FERC-approved rates filed in accordance with Opinion No. 234 are for the purpose of

allowing SERI to recover the costs it incurred in constructing and operating Grand Gulf 1, as well as SERI's FERC-established fair rate of return. SERI therefore has an interest in ensuring that Opinion No. 234 and the obligations derived therefrom are respected by local regulators.

Further, SERI is a plaintiff in a suit pending in the United States District Court for the Eastern District of Louisiana encaptioned: "Middle South Energy, Inc., et al. v. The Council of the City of New Orleans, et al.", Civil Action No. 85-5273 D, in which one of the questions involved is similar to that presented in the instant case: the propriety of federal court abstention in the context of exclusive federal jurisdiction and substantial federal preemption claims.

The brief of New Orleans Public Service Inc., petitioner herein, does not adequately emphasize the importance of this decision to other jurisdictions, particularly those served by SERI. Petitioner's brief also does not discuss the exclusive jurisdictional grant provided in 16 U.S.C. § 825p and its relation to the questions presented for decision in the instant case. If Applicant's argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

System Energy Resources, Inc. ("SERI"), formerly Middle South Energy, Inc. ("MSE"), is the owner of a ninety percent (90%) undivided interest in the Grand Gulf Nuclear Electric Station Unit No. 1 ("Grand Gulf 1"). Grand Gulf 1 provides electricity for customers served by the Middle South System in the States of Louisiana, Mississippi, Arkansas and Missouri. The Middle South System is a highly integrated, coordinated electric public utility holding company system, consisting in part of four operating companies [1] and SERI.

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[1] The operating companies of the Middle South System are New Orleans Public Service Inc. ("NOPSI"), Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), and Mississippi Power & Light Company ("MP&L") (collectively referred to as the "Operating Companies").

On June 13, 1985, the Federal Energy Regulatory Commission ("FERC") issued its "Opinion and Order Setting Just, Reasonable, and Non-discriminatory Rates" for Grand Gulf 1. *Middle South Energy, Inc.*, 31 FERC (CCH) ¶ 61,305 (June 13, 1985) ("Opinion No. 234"), *appeal pending*, No. 85-1611 (D.C. Cir. argued March 24, 1986). In Opinion No. 234, the FERC determined that the costs, capacity and energy of Grand Gulf 1 should be allocated among the Operating Companies in order to equalize nuclear unit investment costs throughout the Middle South System. Pursuant to this determination, the FERC allocated to NOPSI 17% of SERI's share of the costs, capacity and energy of Grand Gulf 1. This allocation translates into an annual cost to NOPSI of approximately $179 million (approximately $15 million per month) which it must pay to SERI.

Because of the dollar significance of the FERC-allocated costs, the Council of the City of New Orleans ("Council") has employed every means available to it to avoid and delay granting retail rates sufficient to cover such costs. Proceedings before the Council were initiated in advance of the then anticipated FERC decision, when, on May 17, 1985, NOPSI filed an application for approval of an increase in rates to coincide with the in-service date of Grand Gulf 1 (July 1, 1985). Notwithstanding several months of procedural posturing, the Council failed to grant NOPSI any rate relief whatsoever until September 5, 1985, when it permitted a "freeze" of NOPSI's fuel adjustment clause. The freeze only allowed NOPSI to retain cash savings in the estimated average amount of $2.83 million per month over a ten-month period, which amount resulted from the expected lower fuel costs associated with Grand Gulf 1.

As a further means of avoidance and delay, on October 17, 1985, the Council instituted an "investigation into the

prudence of NOPSI's actions with regard to its Grand Gulf 1 purchase." Council Resolution R-85-636. The express purpose of this alleged prudence investigation is to determine "what portion, if any, of NOPSI's Grand Gulf 1 expense shall be assumed by its shareholders. . . ." *Id.*[2]

Largely as a consequence of the Fifth Circuit's original ruling in this case,[3] the Council, on March 20, 1986, for the first time permitted NOPSI partially to recover through retail rates some of the FERC-allocated costs. Council Resolution R-86-112 (sometimes referred to as the "Settlement Resolution"). In return for NOPSI's agreement to absorb $51 million of Grand Gulf 1 related

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[2] Any suggestion that the case is not ripe is refuted by this Court's statement in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, —— U.S. ——, 106 S.Ct. 2718, 2722, n.1 (1986):

> We think that any ripeness challenge to respondents' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S., at 458-460, 94 S.Ct. at 1215-1216. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partically in respondent's favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

In the present case, the Council has initiated an "administrative action threatening sanctions" which violates federal law. Under this Court's holdings in *Steffel*, *Doran* and *Ohio Civil Rights*, NOPSI does not have to wait until the Council has actually taken further action before the case is ripe for adjudication.

[3] *New Orleans Public Service Inc. v. City of New Orleans*, 782 F.2d 1236 (5th Cir. Feb. 14, 1986).

costs,[4] the Council granted rate relief which would allow NOPSI to recover the remainder of its Grand Gulf 1 related costs phased-in over a period of years. Significantly, however, the Council expressly reserved its rights to pursue its prudence inquiry and to issue orders with respect thereto.[5] Most recently, the Council ordered NOPSI to participate in hearings conducted as a continuation of the prudence investigation for the purpose of determining how much of the FERC-allocated costs NOPSI can "afford" to absorb if the Council finds that NOPSI was "imprudent." Thus, the Council interprets the Settlement Resolution to allow it to order NOPSI to absorb an additional portion of the FERC-allocated costs in excess of the $51 million already extracted.[6] Clearly, the Council has steadfastly refused to recognize that the costs allocated by the FERC must be treated as an actual operating expense for ratemaking purposes. As a result, NOPSI's ability to make the required payments to SERI continues to be jeopardized.

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[4] In connection with the Settlement Resolution, NOPSI agreed to and did withdraw its pending application for any rate increase other than for the recovery of the expenses incurred as a result of FERC Opinion No. 234. Therefore, this matter deals solely and entirely with the right of NOPSI to recover expenses it incurs as a direct result of the FERC order.

[5] The Council also reserved its "rights" to pursue other avenues designed to insulate ratepayers from paying the FERC-allocated costs of Grand Gulf 1, including (1) an alleged option to purchase NOPSI's "assets" without assuming NOPSI's Grand Gulf rights and obligations; and (2) the abrogation of the Grand Gulf agreements.

[6] In the course of these proceedings, the Council has submitted testimony of its own witnesses who advocate that NOPSI can and should be forced to absorb at least $150 million of Grand Gulf 1 costs in addition to the $51 million discussed above. The Attorney General of Louisiana and Citizens for Safe Energy advocated in these proceedings that NOPSI should be forced into bankruptcy if imprudence is found rather than allowed to recover rates sufficient to pay its share of the FERC-allocated costs.

The failure of NOPSI to remit payments timely could cause SERI to default under various financial agreements between SERI and third parties, including loan agreements with American and foreign financial institutions. This default could lead to the acceleration of debt totaling approximately $2.7 billion. Thus, NOPSI's inability to pay ultimately would place the continuing viability of the entire Middle South System in jeopardy.

In sum, this case raises a problem of extraordinarily serious proportions that threatens the stability of electric supply in Louisiana, Mississippi, Arkansas and Missouri, the jobs of thousands of people, electric service to almost two million customers, and billions of investment dollars. It is a problem involving a substantial federal question that is controlled exclusively by federal law, whose applicability does not depend on any disputed facts or issues of state law. It is therefore a case calling for the immediate exercise of federal judicial authority. SERI has an interest in ensuring that its customers, the Operating Companies, will have a federal forum in which to enforce their federal right to recover the costs allocated by the FERC.

ARGUMENT: REASONS FOR GRANTING THE WRIT

A. The Decision Below Violates This Court's Holding In *Nantahala Power & Light Co. v. Thornburg*

In this case, NOPSI seeks an injunction designed to prevent the Council from impermissibly "trapping" the FERC-allocated costs, that is, an injunction precluding the Council from denying NOPSI the right to recover its wholesale power costs incurred under a FERC-approved rate. The basis of NOPSI's claim is federal law: the filed-rate doctrine (most recently construed by this Court in *Nantahala Power & Light Co. v. Thornburg*, —— U.S. ——, 106 S.Ct. 2349 (1986)) and the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, particularly 16 U.S.C. § 825p.

This Court's decision in *Nantahala* established that a local regulatory body cannot thwart a FERC allocation of costs by "trapping" or otherwise. The question presented here is whether a federal court may avoid enforcing *Nantahala* through abstention. Because NOPSI nowhere challenges the Council's jurisdiction to determine whether there may be cost savings in other areas which may offset the FERC-allocated costs, the relief sought by NOPSI does not involve any legitimate state interest.

Nantahala establishes that the challenged actions of the Council are preempted. In *Nantahala*, the FERC fixed a just and reasonable allocation of "entitlement power" that was jointly available to two affiliated utilities (Nantahala Power & Light Co. and Tapoco, Inc.). The North Carolina Utilities Commission ("NCUC"), however, ordered Nantahala to charge a retail rate reflecting an allocation of relatively low-cost "entitlement power" different from the FERC's allocation. The effect of the NCUC order was to overstate in local retail rates the actual amount of "entitlement power" received by Nantahala and, as a result, to understate Nantahala's total actual expense for the purchase of wholesale power. The retail under-recovery was due to the relatively high cost of Nantahala's supplemental "purchase power" supply. In striking down the NCUC's hypothetical allocation of "entitlement power" for retail ratemaking purposes, this Court stated that the "NCUC cannot substitute its own conception of what allocation of entitlement power would have been . . . fair." —— U.S. at ——, 106 S.Ct. at 2358. Thus, this Court held that the NCUC's order both interfered with, and was preempted by, the Federal Power Act. —— U.S. at ——, 106 S.Ct. at 2351. The Court found impermissible the forced under-recovery, or "trapping", by the NCUC of Nantahala's wholesale power costs. —— U.S. at ——, 106 S.Ct. at 2359, 2360.

The Court squarely addressed the situation of a "middleman" who must pay a FERC-filed wholesale rate and

then seek retail rate recovery from the retail consumers who are ultimately supplied the FERC-allocated power:

> In that situation, for a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme over interstate wholesale power prices. The FERC-approved rate at which the middleman purchased power would not be fully recognized as a cost in the retail market, thereby forcing the middleman to sell power at less than its reasonable cost as determined by the federal agency.

—— U.S. at ——, 106 S.Ct. at 2358. This Court further stated:

> When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . *Such a "trapping" of costs is prohibited.*

—— U.S. at ——, 106 S.Ct. at 2359 (citations omitted, emphasis added).[7]

This is precisely the situation in which NOPSI finds itself. On the one hand, the FERC has ordered NOPSI to pay SERI for Grand Gulf 1 power on the basis of a 17% cost allocation. On the other hand, the Council continues to assert that it can disallow, for purposes of retail rate-making, a portion of the expense which NOPSI incurs as a result of the FERC allocation. As a result, a portion of the wholesale costs that NOPSI is required by the FERC to pay may be impermissibly "trapped" by the

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[7] In reaching this result, this Court embraced the *Narragansett* line of cases and held that the underlying rationale of *Narragansett* is the prevention of local authorities from trapping FERC-allocated costs. The Court rejected the view that *Narragansett* permitted a state authority discretion to determine whether FERC-ordered costs were reasonably incurred where, as in *Nantahala* and here, the FERC has in fact made a just and reasonable allocation of the power under the Federal Power Act.

Council. *Nantahala* clearly establishes that the ability of the Council to "trap" those wholesale costs is preempted by the Federal Power Act.

In *Nantahala*, this Court assumed, without deciding, that local retail authorities could find in certain circumstances that the *quantity* of a given wholesale power purchase may be excessive. —— U.S. at ——, 106 S.Ct. at 2360. However, this Court made clear that such an opportunity for local action does not exist where the FERC allocates the *quantity* in question. —— U.S. at ——, 106 S.Ct. at 2360. In the present case, as in *Nantahala*, the FERC allocated the *quantity* of wholesale power. For the Council to assert, as the NCUC asserted in *Nantahala*, that the utility "had purchased an unreasonably large quantity of high cost power . . . conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking." —— U.S. at ——, 106 S.Ct. at 2360.

As explained in *Nantahala*, the interplay between the federal scheme of wholesale electric power regulation and local policy is decidedly weighted in favor of "the preemptive force of FERC's decision." —— U.S. at ——, 106 S.Ct. at 2358. The strength of the FERC's "preemptive force" is so great that:

> [O]ur decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary. . . .

—— U.S. at ——, 106 S.Ct. at 2356-57 (quoting *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964)).

B. Abstention Is Inappropriate

The Fifth Circuit's reliance on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is misplaced as the present case is significantly different from the situation involved in *Burford.* In *Burford,* federal jurisdiction was based upon diversity of citizenship and an alleged denial of due process of law. No claim of federal preemption was made. The plaintiff in *Burford* simply sought a review of the reasonableness under Texas state law of a Texas commission's permit to drill oil wells. This Court ruled that federal review of the reasonableness of the order would have an impermissibly disruptive effect on pervasive state policy for the management of local oil fields. The Court stated:

> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts . . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 333-34. In *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 815 n.21 (1976), this Court noted that the presence of a federal basis for jurisdiction "may raise the level of justification needed for abstention."

Precedent is well-established that *Burford* abstention is inappropriate where a federal plaintiff asserts a preemption claim. *Kentucky West Virginia Gas Co. Pennsylvania Public Utility Commission,* 791 F.2d 1111 (3d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Commission,* 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied,* 106 S.Ct. 884 (1986); *Baggett v. Depart-*

ment of Professional Regulation, 717 F.2d 521, 524 (11th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Commission*, 614 F.2d 205, 212 n.1 (9th Cir. 1980).

As stated in *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d at 1116:

> The rationale underlying these decisions is simple and straightforward: "[t]he purpose of *Burford* abstention is to avoid federal intrusion into matters of local concern and which are within the special competence of local courts," whereas "supremacy clause claims are 'essentially one[s] of federal policy,' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles.'" . . . In short, then, *where "Congress has created a statutory scheme . . . which arguably preempts the local regulation complained of, a fundamental element of Burford abstention is thrown into doubt*, for we must question whether the case indeed involves an essentially local issue." (Citations omitted, emphasis added).

To argue that abstention is proper where the preemption claim involves state or local action which interferes with the enforcement of a comprehensive scheme of exclusive federal regulation perverts the very premise of abstention—avoiding needless federal intervention into important matters within a state's jurisdiction to regulate. In this case, NOPSI does not challenge the Council's jurisdiction to determine whether there may be cost savings in other areas which may offset the FERC-allocated costs. Therefore, this case does not present a federal intervention into matters over which the Council has jurisdiction.

Abstention deprives litigants such as NOPSI of a federal forum in which to enforce federal rights. Indeed, if the decision of the court below is upheld, it will preclude any federal court challenge to state authority based

on federal preemption resulting from claims arising out of the provisions of the Federal Power Act, other than by appeal or petition to this Court.[8]

In sum, the implementation, enforcement and effect of FERC Opinion No. 234, and the duty imposed thereby on respondents to recognize the FERC-allocated costs as a legitimate operating expense in accordance with the filled-rate doctrine, relate solely to federal supremacy. This Court recently reaffirmed this in *Nantahala*. As such, this matter is proper for federal court adjudication.[9]

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[8] If the lower court's decision is allowed to stand, it can be expected that an ever-increasing number of cases will be brought directly from the state courts to this Court, which will become the sole federal forum for the vindication of a public utility's federal rights. The rising costs of electrical power and the cost overruns in the nuclear power industry have spawned considerable litigation. "Trapping" issues were considered in *Nantahala* and are presented again for review by this Court in *Commonwealth Electric Co. v. Dept. of Public Utilities, petition for cert. filed*, 55 U.S.L.W. 3156 (U.S. July 17, 1986) (No. 86-61).

[9] Even should this Court find that a *per se* prohibition against *Burford* abstention is not warranted, in the context of federal preemption claims under the Federal Power Act, the lower court's reliance on *Burford* under the facts of this case was improper. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). Furthermore, a federal court should not dismiss a suit merely because a state court may entertain it (*Id.* at 814 (citations omitted)), or because resolution of the federal issue may upset state policy. *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978).

Under *Burford*, abstention may be proper where the "exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814. A court invoking *Burford* abstention "essentially defers to a state's overriding interest in the matters *sub judice* and, concomitantly, *to the superior competence of the state's courts to adjudicate such matters.*" *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) (emphasis added). Neither of these principles is applicable. The

The opinion below also holds that abstention is proper under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The Fifth Circuit's decision in this matter places it in conflict with decisions of the Eighth, Ninth and Eleventh Circuits. In *Middle South Energy v. Arkansas Public Service Commission*, 772 F.2d 404, 417 (817 Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 884 (1986), the Eighth Circuit refused to apply *Younger* abstention in another case involving Grand Gulf 1 in which federal preemption claims were presented:

> Similarly, the rule of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), limiting injunctions of pending state proceedings embodies the principle of our federal system that legitimate state functions be respected. This "comity," however, is not strained when a federal court cuts off state proceedings that entrench upon the federal domain. *Baggett*, 717 F.2d at 524. The legitimate state interest contemplated by *Younger*, *see Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 74 L.Ed.2d 116 (1982), does not exist when the state action has been preempted or foreclosed by the Constitution. *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984) (footnote omitted).

In *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984), the Ninth Circuit reversed and remanded a case because it found that the district court had abused its discretion in abstaining under *Younger* where a claim of federal preemption was presented. Similarly, in *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), the Eleventh Circuit rejected the application of *Younger* abstention where a

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Council has no right to attempt to establish "a coherent policy" which is contrary to federal law. Further, neither the Council, nor Louisiana courts, has a "superior competence" to determine the federal law issues presented by NOPSI.

preemption claim is readily apparent and involves a state agency acting beyond its lawful limits of authority. In such cases, the court noted "abstention can serve no principle of comity or of 'our federalism.'" *Id.* at 524 (citing *Empire Inc. v. Ashcroft*, 524 F.Supp. 898 (W.D. Mo. 1981)).

Younger typically applies when a party who asserted a constitutional defense in a state-initiated enforcement proceeding before a state court or agency also seeks to have a federal court enjoin the state proceeding on the same basis. The doctrine of "our federalism" is premised on the principle that, in light of the Fourteenth Amendment, constitutional guarantees are just as applicable to states, and state courts are therefore competent to interpret and enforce them. *Younger* should not be applied to federal proceedings in which a party has sought enforcement of rights arising from an order of a federal regulatory agency on the basis of federal preemption.

C. The Decision Below Ignores Petitioner's Allegations Under 16 U.S.C. § 825p.

Parts I and II of the Fifth Circuit's initial decision discuss the applicability of 16 U.S.C. § 825p,[10] "a provision [of the Federal Power Act] which serves to reinforce the general jurisdiction provisions governing federal district courts." *New Orleans Public Service Inc. v. City of New Orleans*, 782 F.2d 1236, 1239 (5th Cir. 1986) (Citation omitted). The court's initial decision failed to determine the applicability of this provision: "We need not and do not decide, however, whether the

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[10] Section 825p provides in relevant part:

The District Courts of the United States, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

federal court had jurisdiction of this matter under § 825p, for federal jurisdiction over NOPSI's statutorily-based preemption claim can be sustained under a different jurisdictional grant: 28 U.S.C. § 1331." *Id.* at 1240.

In light of the Fifth Circuit's revised holding, resolution of this question is essential. If jurisdiction is proper pursuant to 16 U.S.C. § 825p, which grants federal courts *exclusive* jurisdiction over actions brought to "enforce any liability *or duty* created by . . . any rule, regulation or order" promulgated pursuant to the Federal Power Act, federal court abstention is obviously improper. And, as the Fifth Circuit noted:

> at least one Circuit has held that § 825p does not require an undisputed violation of a clear FERC opinion before jurisdiction may be assumed by the district court. Rather, parties may heatedly dispute *the effect and interpretation* to be given a FERC opinion and still obtain federal jurisdiction under § 825p. *State of California v. Oroville-Wyandotte Irrigation District*, 411 F.Supp. 361 (E.D. Ca. 1975), *aff'd* 536 F.2d 304 (9th Cir.), *cert. denied*, 429 U.S. 922 (1976) (finding jurisdiction under 16 U.S.C. § 825p even where there was a conflict in the way different agencies interpreted the effect of decisions by the FPC [precursor to FERC] and the California Public Utilities Commission, and concluding ultimately that the two decisions did not conflict).

782 F.2d at 1240 n.4 (emphasis supplied). Additionally, in light of this Court's decision in *Nantahala*, the district court's conclusion that FERC Opinion No. 234 imposed no duty on respondents, as local regulators, to recognize the FERC-allocated costs associated with Grand Gulf 1 as a legitimate operating expense of NOPSI must be rejected.

In *Nantahala*, this Court held that the filed-rate doctrine of *Montana-Dakota Utilities Co. v. Northwestern*

Public Service Co., 341 U.S. 246, 251-52 (1951), requires local utility regulators to allow, "as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, —— U.S. at ——, 106 S.Ct. at 2356. "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." U.S. at ——, 106 S.Ct. at 2357.[11] Further, where, in addition to setting rates, the FERC makes an allocation of costs, local regulators cannot ignore that allocation by arguing that the utility should have obtained less expensive electricity than was allocated by the FERC. —— U.S. at ——, 106 S.Ct. at 2360. Respondents have refused to acknowledge that NOPSI's FERC-allocated costs must be recognized as a legitimate operating expense. As NOPSI's claims are premised on the duty imposed on respondents resulting from the effect of FERC Opinion No. 234, exclusive federal jurisdiction exists pursuant to 16 U.S.C. § 825p, thereby prohibiting the exercise of federal court abstention.

CONCLUSION

The abstention doctrines are particularly inappropriate where a plaintiff has presented a substantial federal preemption claim and no legitimate state interest is involved. Abstention should not be permitted to become a vehicle by which federal courts can abdicate their responsibility to enforce this Court's holding in *Nantahala*. Because Opinion No. 234 through the filed rate doctrine imposes a duty upon respondents to recognize the FERC-allocated costs, exclusive jurisdiction exists pursuant to 16 U.S.C. § 825p. For these reasons, abstention is improper. Ac-

[11] While *Nantahala* also holds that an increase in FERC-approved wholesale rates need not lead to an increase in retail rates, "such a divergence between wholesale and retail rates would occur only if costs *other than* those resulting from the purchase of FERC-regulated power or gas were to decrease." *Nantahala*, —— U.S. at ——, 106 S.Ct. at 2349 (emphasis by the Court).

cordingly, SERI respectfully submits that certiorari should be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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No. 86-546 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN OPPOSITION TO THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the National Association of Regulatory Utility Commissioners ("NARUC") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

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[1] NARUC has obtained consent to file this brief from respondents, The City of New Orleans, *et al.* The letter granting such consent has been filed with the Clerk of the Court. The petitioner, New Orleans Public Service Inc., has consented orally to NARUC's participation, but no written confirmation has been received.

SPECIAL INTEREST OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The City of New Orleans, respondent herein, through its regulation of utilities, is a member of the NARUC, as are the regulatory commissions of Arkansas, Louisiana, and Mississippi, which regulate utilities affiliated with New Orleans Public Service Inc., petitioner herein. These commissions support the NARUC's filing of its brief.

Most of the public utilities subject to regulation by NARUC's members also are subject to regulation at the federal level with respect to services provided or transactions undertaken in interstate commerce. Although regulation by federal agencies and regulation at the State level by NARUC's members generally are compatible, in recent years an increasing number of disputes have arisen as to whether State regulation, to some extent, has been preempted by federal law or by the actions of a federal agency. In such instances, NARUC has a continuing interest in ensuring that overbroad interpretations of the scope of federal jurisdiction do not impinge upon or frustrate the ability of NARUC's members to discharge obligations entrusted to them under State laws.

In this case, the Fifth Circuit affirmed the decision of the district court to abstain from deciding a claim of federal preemption, where the local regulator had

not yet issued a final decision and adequate State court remedies existed. In other recent cases, some courts have decided to abstain, and others have decided not to abstain, when confronted with a claim of federal preemption. The petitioner in this case asserts that there exists a conflict among the circuit courts on the question whether to abstain in the face of a preemption claim. The petitioner evidently seeks a ruling from this Court that abstention by a federal court never (or rarely) is proper when the utility has asserted a claim of federal preemption.

NARUC has a strong interest in preserving the doctrine of federal abstention and believes that the circuit courts can address the abstention issue in the context of alleged preemption without further guidance from this Court. As the association of State utility regulators throughout the country, NARUC believes that it can assist in articulating the reasons why the issue raised by the petition does not require Supreme Court review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, NARUC respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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November 7, 1986

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INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in

the regulation of utilities and carriers. The City of New Orleans, respondent herein, is a member of the NARUC, as are the regulatory commissions of Arkansas, Louisiana, and Mississippi, which regulate utilities affiliated with New Orleans Public Service Inc., the petitioner herein. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, these officials have the obligation to assure the establishment of such electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislatures, established to regulate utilities exercising monopoly powers within their service territories.

As explained in its accompanying motion, the NARUC's status as the national representative of State and local regulatory bodies gives the Association a strong interest in preserving the doctrine of federal abstention. Wholesale abandonment or restriction of that doctrine in the context of retail electric regulation would greatly frustrate and impede the ability of NARUC members to properly discharge their responsibility under law to regulate utilities in the public interest. Utility regulation is a delicate, complex process through which regulators exercise their expert judgment to balance the interests of utilities and ratepayers. A decision by this Court which restricts the

abstention doctrine, thereby thrusting the federal judiciary into essential local regulatory matters, would greatly and adversely affect the ability of all NARUC members to regulate in a reasoned, careful, and judicious manner. Therefore, the NARUC's strong interest in this case is apparent.

STATEMENT OF THE CASE

NARUC adopts the Statement of the Case provided by respondents The City of New Orleans, *et al.*

REASONS WHY THE COURT SHOULD DENY THE PETITION

NARUC will not burden the Court with an extensive discussion of the facts of this case or analysis of the other cases in which the federal courts have determined whether to abstain in the presence of a federal preemption claim. Respondents have set forth the facts of this case in detail and have ably addressed the issues of mootness, ripeness, exhaustion of administrative remedies and abstention, as well as the underlying issue of preemption in the context of the Federal Power Act. Moreover, a lengthy *amicus* brief in opposition to the petition might give credence to the suggestion by petitioner and other *amicus* parties that this case presents an issue the Court should decide. NARUC's sole purpose here is to make clear that the position of respondents—that the petition should be denied—reflects a view shared by State regulatory bodies throughout the country.

Recent experience in the electric utility industry underscores the vital role played by State utility regulators in striking a proper balance between the sometimes conflicting objectives of fostering sound

conditions in the industry and protecting the interests of ratepayers. A request by an electric utility for retail rate relief sufficient to cover expenses associated with a high-cost nuclear plant may raise a number of significant issues that local regulators are well-equipped to address. Such issues include the prudence of the utility in incurring the involved expenses, the appropriateness of "phasing in" the requested increase in order to mitigate the adverse "rate shock" effect on the local community, and the need for a rate design that equitably allocates the increase among different classes of retail ratepayers. The extent, if any, to which such functions are preempted by federal law, or by specific actions of the Federal Energy Regulatory Commission ("FERC"), can only be determined through careful adherence to the "bright line" between federal and State jurisdiction drawn by the Federal Power Act and through careful consideration of the specific actions taken by the FERC and by the State regulator in a particular case. Such determinations also must, of course, be guided by this Court's recent decision in *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

The State courts, no less than the federal courts, are competent to make such determinations. Moreover, a claim of federal preemption can better be addressed when the State regulator has had an opportunity to render a decision on the merits. The doctrine of federal abstention is based on notions of comity and federalism, and ensures that the States remain free to address issues of significant local concern without interference by the federal courts.

The federal courts appear, on the whole, to be following a rational approach in determining whether to

abstain in the presence of a federal preemption claim. While a particular State regulator or utility may disagree with the result reached in a particular case, the pattern that has emerged indicates that the federal courts will look closely at the facts of each case and the precise nature of the preemption claim asserted before determining whether to abstain. Some courts have decided to abstain and some have not, but no court has adopted a rigid rule either mandating or barring abstention in the face of a preemption claim. In these circumstances, further guidance from this Court is not necessary. This is particularly true in light of the guidance on abstention recently provided by the Court in *Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 86-546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,
v.
THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

and

BRIEF OF EASTERN UTILITIES ASSOCIATES AND NORTHERN STATES POWER COMPANY (MINNESOTA) AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICI CURIAE*

Pursuant to Rules 29, 36 and 42 of the Rules of the United States Supreme Court, Eastern Utilities Associates ("EUA") and Northern States Power Company (Minnesota) ("NSP") respectfully move for leave to file the attached brief as *amici curiae*.[1]

REQUEST FOR LEAVE TO FILE OUT OF TIME

At the outset, EUA and NSP recognize that the deadline for making their motion expired several months ago. EUA and NSP respectfully urge that they be permitted to file the attached brief out of time and, in support, state as follows:

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[1] Petitioner consents to the filing of this brief by EUA and NSP and has filed its letter of consent with the Clerk of this Court. Respondents do not consent to the filing of this brief.

EUA is the registered utility holding company of an electric system in Massachusetts and Rhode Island. NSP owns an electric utility system serving in five states in the upper Midwest.[2] Both the EUA and NSP systems rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation. Therefore, EUA and NSP are in a position to be substantially affected by the Court's decision in this case, which involves the question of whether Federal courts may abstain from exercising jurisdiction to ensure that the "filed rate" doctrine is observed by state commissions.

Neither EUA nor NSP was a party to the proceeding below. They recently became aware that action on the petitions for writ of certiorari was awaiting submission of the views of the Solicitor General. Considering that the submission of an *amici curiae* brief apparently would not interfere with the processing of the petitions, they promptly filed the attached brief urging grant of certiorari.

Permitting EUA and NSP to file their motions out of time will not prejudice the Court or any party. EUA and NSP do not seek a delay in the normal course of review by this Court. EUA and NSP will, if permitted to file their brief, observe any future deadlines that the Court may establish. The attached brief does not require special research or background work.

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[2] The only affiliates of EUA that are not wholly owned are four nuclear generating companies: Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Maine Yankee Atomic Power Company. The only affiliates of NSP that are not wholly owned are Chippewa and Flambeau Improvement Company and Eloigne Company.

SPECIAL INTERESTS OF EUA AND NSP

As the attached brief demonstrates, the EUA and NSP systems have been involved in cases in which state commissions in retail ratemaking have sought to disallow costs incurred under FERC-filed rate schedules. In those cases, each system has had recourse to the courts to enforce rights under the Federal Power Act. They may have need for such recourse again.

If Federal courts are permitted to abstain from deciding issues of preemption and burden on interstate commerce, EUA and NSP will have to depend exclusively on state commissions and state courts for protection of their rights. In certain circumstances, they perceive that effective relief may be available only in the Federal courts.

EUA and NSP believe that they can provide expertise and insight as to the importance of these issues to electric utility systems which will be directly affected by the Court's decision in this case. The attached *amici curiae* brief demonstrates the significance of these issues to EUA and NSP and provides background as to why their participation in this case may be helpful in this Court's decisionmaking process.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EUA and NSP respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae* out of time.

Respectfully submitted,

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January 1987

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BRIEF OF EASTERN UTILITIES ASSOCIATES AND NORTHERN STATES POWER COMPANY (MINNESOTA) AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

Eastern Utilities Associates ("EUA") is the registered utility holding company of an electric system in Massachusetts and Rhode Island. In the EUA system, all generation and transmission service is rendered by a power supply subsidiary. This company sells power at wholesale to two distribution companies within the system that resell the power at retail. Each distribution company serves in a separate retail jurisdiction.

Northern States Power Company (Minnesota) ("NSP") owns an electric utility system serving in five states.

NSP directly serves in Minnesota, North Dakota and South Dakota. A wholly owned subsidiary, Northern States Power Company (Wisconsin), serves in Wisconsin and Michigan. In the NSP system, the generation and transmission facilities are owned by the company in whose service area they are located.

While the EUA and NSP systems are organized along different lines, they have this in common: they both rely upon rate schedules filed at the Federal Energy Regulatory Commission ("FERC") to obtain an allocation of system power supply costs among their constituent parts and upon the "filed rate" doctrine under the Federal Power Act to achieve recognition in retail ratemaking of the FERC-filed allocation.[1]

For both the EUA and NSP systems, the end results of the FERC-filed allocation are homogenized, or equalized, power supply costs for the constituent retail companies of the system—that is to say, identical unit costs of power supply throughout the system. For an electric system that is planned and operated as a single integrated system for the benefit of customers as a whole, there is strong engineering and economic justification for this approach.[2]

The EUA system and the NSP system each has invoked the filed rate doctrine in court to preserve equalization of power supply costs. For both systems, the litigation arose

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[1] As it applies here, the "filed rate" doctrine holds that wholesale rates filed at FERC must be given binding effect by state utility commissions in setting retail rates. *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349, 2354 (June 17, 1986).

[2] In the EUA system, system power supply costs are equalized by having the system power supply company sell power to the two system distribution companies under a single wholesale rate. In the NSP system, power supply costs are equalized under a system interchange agreement pursuant to which the parent and its subsidiary sell power to each other at cost in such amounts that their unit costs are equalized.

from efforts to recover in retail rates the costs of abandoned nuclear construction projects. In the EUA and NSP abandonment cases at FERC, state commissions and other state agencies availed themselves of the opportunity to intervene on the merits of cost recovery. Subsequently, they collaterally challenged FERC's treatment of the cost recovery in retail proceedings. In EUA's case, a state commission declined to pass through to retail customers the abandonment costs that FERC had allowed to be collected in wholesale rates subject to investigation and refund.[3] In NSP's case, the regulatory commissions in the three states in which the parent renders service sought to avoid FERC-allowed abandonment costs of a project planned for construction by both companies in a fourth state, where the subsidiary serves.[4] On appeal of the state commission orders, the courts held in both cases that the commissions were bound to respect the FERC-filed rates.

As multi-state electric utility systems which allocate power supply costs under FERC-filed rate schedules, NSP and EUA obviously have an interest in the vitality of the "filed rate" doctrine. This Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (June 17, 1986), confirms that the "filed rate" doctrine applies to cost allocations among affiliates under FERC-filed rate schedules. However, as the phenomenal proliferation of litigation under the doctrine in the last few years vividly demonstrates, extensive efforts are underway to avoid and circumscribe the doctrine in particular

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[3] *Eastern Edison Co. v. Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983).

[4] *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S.Ct. 3546 (1983); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32 (N.D. 1981). See also: *South Dakota Public Utilities Commission v. FERC*, 690 F.2d 674 (8th Cir. 1982); *State of Minnesota v. FERC*, 734 F.2d 1286 (8th Cir. 1984).

cases. From this litigation it is evident that in some cases the parties must have access to the Federal courts to enforce their rights under the Federal Power Act, if the "filed rate" doctrine is to have practical meaning. Currently, some circuits permit access as a matter of right in "filed rate" doctrine cases and others, under abstention principles, deny it. This disarray among the circuits is fueling collateral challenges to FERC's decisions and generating litigation on all sides. A national rule is urgently needed.

STATEMENT OF THE CASE

EUA and NSP adopt the Petitioner's Statement of the Case.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. In the last several years, states have become suddenly active in efforts to have power supply costs—particularly from the more expensive sources of supply—allocated to other jurisdictions. The efforts, of course, may or may not be justified, depending on the circumstances of the particular case. But whatever the merits of the efforts, when the allocation is achieved under a rate schedule filed under the Federal Power Act, the proper forum is FERC, a neutral agency charged by Congress with deciding such issues under a standard of justness and reasonableness, specifically without preference to locality.[5]

The states' motives for attempting to keep power supply cost allocation issues away from FERC and within the affected states are, of course, understandable. As some of the recent litigation shows, allocation issues can

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[5] Section 205(b) of the Federal Power Act requires FERC to declare unlawful any "unreasonable difference" in rates "as between localities" 16 U.S.C. § 824d(b).

become highly charged public and political issues in which the interests of local jurisdictions clearly predominate over larger considerations of equity and interstate commerce. In such cases, various agencies of the state government, affected municipalities, elected officials and local industry groups join in the litigation. In effect, the jurisdiction mobilizes its resources to conduct a legal, political and publicity campaign in favor of cost avoidance. Counter-campaigns may be organized in other jurisdictions.

Whether the state courts can remain above the fray in these circumstances is at least questionable. Reading the cases, one might conclude that some state courts have done so and some have not. The Federal courts would seem to be especially suited to decide issues of this sort—resolving questions of competing state economic interests under Federal law. An abstention doctrine that allows Federal courts to avoid these cases and return them to the courts of the interested states strikes at a major purpose—perhaps the central purpose—of the Federal lower court system.

2. The deluge of "filed rate" doctrine cases is almost surely not a temporary phenomenon. It is true that the occasion for much of the recent "filed rate" litigation has been expensive construction programs that either have been abandoned before completion or brought to completion in the face of declining load growth. But in the background of this immediate development, which may abate over a period of four or five years, is a longer term development that promises not to abate but to grow steadily. This development consists of two related phenomena: (a) increased wholesale power sales as the network of extra high voltage transmission lines is built up throughout the nation and (b) the gradual introduction of increased competition into wholesale power supply markets. The first phenomenon allows utilities to sell power over wider geographic areas. The second brings

into the wider wholesale power supply markets generating companies that may or may not be affiliated with traditional utilities, but whose rates, as wholesale rates, will be regulated by FERC.

Both phenomena foretell increased activity under FERC regulation. That activity will inevitably raise new legal and policy questions and pose issues of the impact in retail ratemaking of FERC's resolution of those questions. In the interest of the increasingly interstate character of power supply, access to the Federal courts should be available for the resolution of these retail rate impact issues. If the Federal courts are not available, local jurisdictions will be in a position to frustrate, in practice, decisions and policies made by FERC under the Federal Power Act and electric utility systems such as EUA and NSP will be left with unrecoverable "trapped costs."

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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